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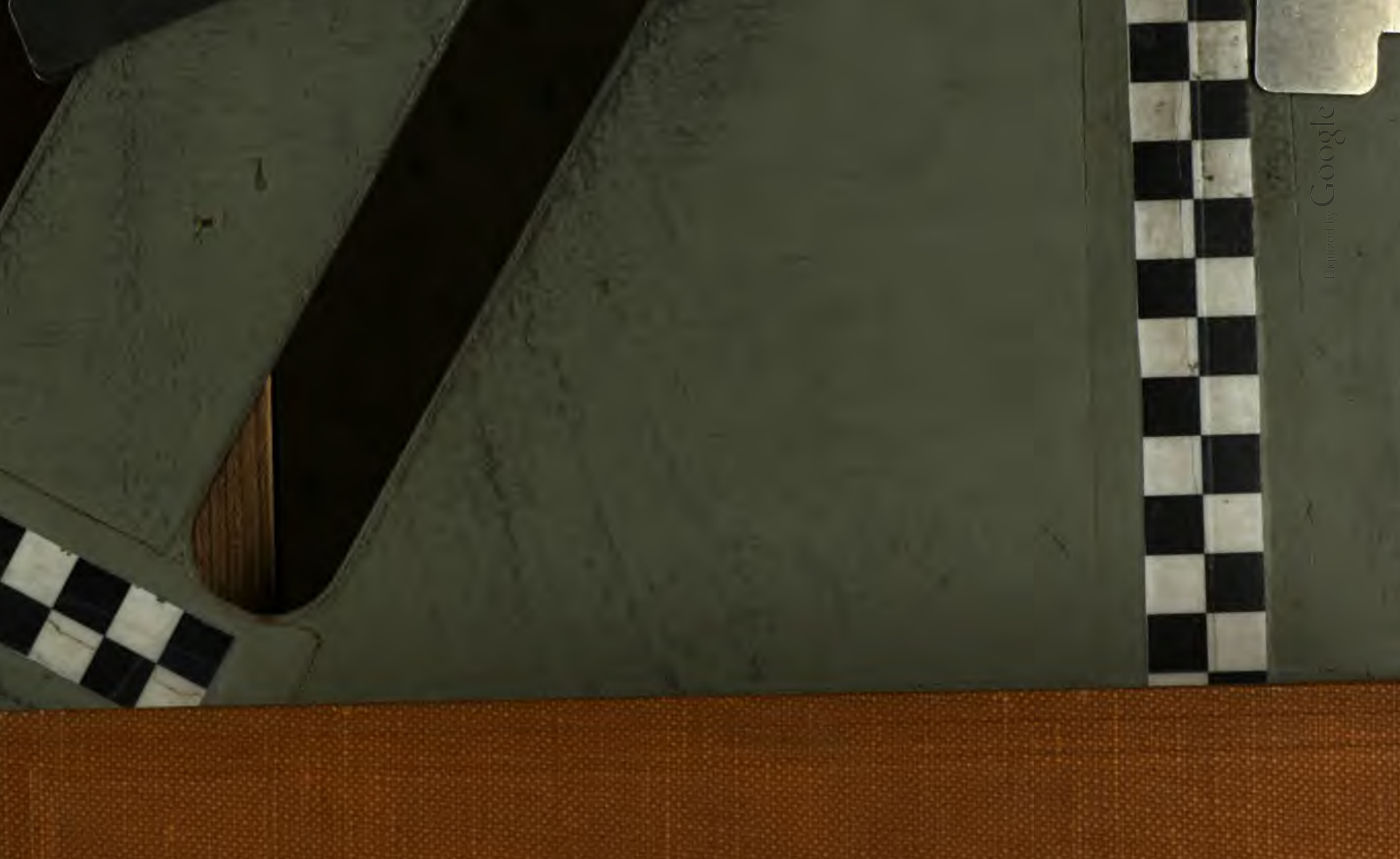
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MASSACHUSETTS REPORTS

190

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MASSACHUSETTS

DECEMBER 1905 — MARCH 1906

HENRY WALTON SWIFT

REPORTER

BOSTON
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JUSTICES

OF THE

SUPREME JUDICIAL COURT

DURING THE TIME OF THESE REPORTS.

HON. MARCUS PERRIN KNOWLTON, CHIEF JUSTICE.
HON. JAMES MADISON MORTON.
HON. JOHN LATHROP.
HON. JOHN WILKES HAMMOND.
HON. WILLIAM CALEB LORING.
HON. HENRY KING BRALEY.
HON. HENRY NEWTON SHELDON.

ATTORNEYS GENERAL.

HON. HERBERT PARKER.
HON. DANA MALONE.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MASSACHUSETTS.

EDWARD B. HAYWARD, trustee, *vs.* WILLIAM G. ROWE, administrator, & others.

Bristol. October 23, 1905. — December 11, 1905.

Present: KNOWLTON, C. J., LATHROP, LORING, BRALEY, & SHELDON, JJ.

Devise and Legacy, Construction.

A testator, whose estate was not large, left by his will $500 to his housekeeper "to be in trust of my executor and put in savings bank, the income to be paid to her yearly, and the executor can draw this money, and buy a cheap place for her to occupy during her life if he thinks it would be for her good." The will contained no residuary clause. On the death of the legatee the fund remained in the hands of the trustee unimpaired. *Held*, that the gift was absolute, subject to the trust during the lifetime of the legatee, and that on her death the legal title vested in the administrator of her estate.

BILL IN EQUITY, filed in the Probate Court for the county of Bristol on November 13, 1903, by the trustee under the will of George W. Safford, late of Easton, for instructions as to the distribution of a legacy of $500 under the second paragraph of that will, which is quoted in the opinion.

In the Probate Court *Fuller*, J. made a decree that as to the fund given by the second paragraph of the will for the benefit

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of Mary J. Witherell, that beneficiary "was the sole equitable owner thereof and the title thereto now belongs to her administrator." William J. Safford, a son of the testator, appealed.

The case came on to be heard before *Braley*, J., who found, if competent and material, "that George W. Safford, the testator, at the date of the will and at his death, had on deposit in the North Easton Savings Bank a sum of money sufficient to cover all the pecuniary legacies, whether gifts absolute or in trust, and that Mary J. Witherell, now deceased, during her lifetime, never made any demand for, or claim to, the principal sum, but was paid the income therefrom by the executor, though at her death there was a small balance of accrued income due to her."

At the request of the parties the justice reserved the case upon the pleadings and the foregoing finding for determination by the full court.

J. Everett, for Clara A. Cooper, a daughter of the testator, and William J. Safford.

W. G. Rowe, administrator, *pro se*.

No counsel appeared for the trustee.

BRALEY, J. By the testator's will in clause fourteen his housekeeper is given the household goods and furniture, while by the second clause she receives a pecuniary bequest in these words, "To Mary J. Witherell, my housekeeper $500 to be in trust of my executor and put in savings bank, the income to be paid to her yearly, and the executor can draw this money, and buy a cheap place for her to occupy during her life if he thinks it would be for her good." She having died leaving the principal of the fund unimpaired, or unconverted by the trustee, we are asked to determine whether it shall be paid to her administrator, or distributed among the testator's next of kin as undevised assets of his estate, there having been no residuary clause in his will.

The will is not drawn with technical precision in the use of terms, and not much, if any, aid as to the testator's intention is to be derived from the other clauses. In the bequest to his daughter, omitting the words "to be in trust," the same form of gift is used, while the pecuniary gifts to his son and to his grandchildren add the words "in trust," but all contain a pro-

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vision that the income is to be paid yearly. His estate evidently was not large, and there being no residuary clause an inference cannot safely be drawn that his intention was otherwise than to make a full testamentary disposition of his property.

It was said in *Chase* v. *Chase*, 132 Mass. 473, 474, "Ordinarily, an unqualified gift of the use, income and improvement of personal estate vests an absolute interest."

Where the income is bequeathed for life with a remainder over, the executor, if no provision is made for a trustee, holds the fund and pays the interest to the beneficiary. The intention of the testator in such a case is clear that the first taker is not to have the possession of the property, but is to receive only the income, while on the happening of a stated contingency the principal is to pass to others. *Saunderson* v. *Stearns*, 6 Mass. 37. *Dorr* v. *Wainwright*, 13 Pick. 328, 331. *Lewis* v. *Shattuck*, 173 Mass. 486.

So far as his means permitted, the testator's object was to provide a comfortable support for his housekeeper, and with abundance of caution he provided for the investment of the fund in some savings bank, or if her personal comfort would be better served then the entire sum might be used to provide her with a home. To accomplish this, instead of giving the possession to her he used the words "in trust of my executor." But the legal title conferred must be held to have been commensurate with the power to convert the fund into real property, and thus was limited to her life. *Boston Safe Deposit & Trust Co.* v. *Mixter*, 146 Mass. 100.

During her lifetime she was vested with an absolute equitable title, and although the legal title was in the trustee this did not limit or diminish her interest. Upon her death, the trust having been fully executed, the legal title followed the equitable title, and the fund became part of the assets of her estate. *Fay* v. *Phipps*, 10 Met. 341. *Chauncey* v. *Francis*, 181 Mass. 513. *Chauncey* v. *Salisbury*, 181 Mass. 516.

Decree of the Probate Court affirmed.

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JULIUS M. COHEN *vs.* EDWARD J. NAGLE & another.

Suffolk. November 28, 1904. — January 2, 1906.

Present: KNOWLTON, C. J., MORTON, LATHROP, HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Equity Pleading and Practice. Trade Name. Equity Jurisdiction, To restrain wrongful use of trade name.

In case of an appeal from a decree in equity made by a single justice of this court, if the justice, although not requested by the appellant under R. L. c. 159, § 23, to report the material facts found by him, acting in his discretion voluntarily files a "memorandum of decision" which is a report of his findings of fact, the memorandum becomes a part of the record as much as if it had been made as a report of findings in response to a request under the statute.

A manufacturer of cigars who, not having a right to the word "Keystone" as a trademark, has established an extensive business in the New England States, where his cigars have become well and favorably known in the trade and to the public as "Keystone cigars" or "Keystones," can maintain a suit in equity to restrain the use of the word "Keystone" by another cigar manufacturer in such a way as to injure the plaintiff by causing the public to believe that the cigars sold by the defendant are those manufactured by the plaintiff, although the word "Keystone" before and at the time of its adoption by the plaintiff was used as a public brand or label in connection with the manufacture and sale of cigars, principally in the Middle and Western States; and, if in such a case a decree has been made restraining the defendant from using the word "Keystone" in the New England States, and the defendant appeals from this decree, the plaintiff taking no appeal, it is not open to the defendant to contend that the decree is too narrow, and should have been made, if at all, without geographical limitation, and it is not necessary to decide whether an injunction without geographical limitation might have been issued in favor of the plaintiff. LORING, LATHROP, & HAMMOND, JJ. concurring in the result reached, but further expressing the opinion that, it not having been shown that the trade meaning of the word "Keystone" extended beyond New England, the injunction rightly was confined to that territory.

A defendant in equity against whom a decree for an injunction has been made, on appealing from the decree, the plaintiff taking no appeal, will not be allowed to object to it on the ground that, if granted at all, it should have been broader in its scope.

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KNOWLTON, C. J. This is a suit in equity to obtain an injunction against the fraudulent and wrongful use of the plaintiff's trademark and his trade name, which he adopted and used in the manufacture and sale of cigars, and for the recovery of damages caused by the defendants' wrongful interference with the plaintiff's trade.

The justice * who heard the evidence filed a "memorandum of decision," which is a report of his findings of fact. A preliminary question is whether this is a part of the record, which has the effect of such a report made under the R. L. c. 159, § 23. We are of opinion that it is. It is a convenient and proper practice to put upon the record a report of facts found, in order to present, in a succinct form, the substance of the conclusions from the evidence on which the decree is founded. This brings directly to the attention of the court that which, in some jurisdictions, is found in long recitals in the decree. The statute just referred to makes the filing of such a report compulsory upon the justice, if an appellant requests it within four days after he has been notified of the filing of the decree. The findings stated in such a report will not be set aside unless they are plainly wrong, and we are of opinion that the presiding justice may, in his discretion, file such a report voluntarily, which shall have the same effect as one filed under the statute.

The findings of the justice in the present case are as follows: "If the plaintiff's case stood on the alleged similarity of the boxes and packages in which the defendants' cigars are put up to the boxes or packages in which the plaintiff's cigars are put up, I do not think that he has made out a case which would entitle him to relief. In other words, I do not think that the evidence shows that the particular style or shape or dressing of the boxes in which his cigars are put up and sold has become so associated with his cigars in the minds of that portion of the public which purchases and deals in cigars, that the style or shape or dressing of the boxes in which the defendants' cigars are put up and sold would tend to mislead and deceive, or do mislead and deceive, the public into believing that they are buying the plaintiff's cigars, when they are buying the defendants' cigars or some other cigars.

* Mr. Justice Morton.

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In fact, I understand counsel for the plaintiff substantially to concede that unless the defendants are restrained in the use of the word 'Keystone' the other relief which they seek will be of no practical benefit.

"I think that the evidence shows that the word 'Keystone' had been used as a brand in connection with the manufacture and sale of cigars, by manufacturers and dealers in cigars, before the plaintiff began to use it, and that that use continued down to the time when the plaintiff adopted it and began to use it. But I think, and I so find, that this use was confined in the main to the Middle and Western States. Some cigars were sold in Connecticut, and a few in Vermont and Massachusetts, and perhaps in one or two of the other New England States, as 'Keystone' cigars, but the number was not large, and the public and the dealers did not come to recognize any particular cigar as the 'Keystone' cigar, as they have come to recognize the plaintiff's cigar. The plaintiff adopted the word in 1885 in connection with a five-cent cigar manufactured and sold by him. When he adopted the name he did not know that it had been used before, and supposed that he was the originator of it. From that time on he continued to make and use the cigars in increasing quantities, until he has worked up in New England a large trade in them, the evidence showing that he sells between four and five millions yearly, of the value of about $160,000. The cigars are well and favorably known throughout New England many regarding them as the best five-cent cigar in the market. I doubt whether the plaintiff has established his right to the use of the word 'Keystone' as a trademark in the strict sense of that term. But I think that the evidence shows, and I find, that his cigars have become known to the trade in New England and to the public in New England by the name 'Keystone,' which he has adopted, and that the public in New England have come to associate the word 'Keystone' with his cigars, and not with the cigars of any other person. He has spent large sums in introducing the cigar in New England, and building up a trade there, and the name is a valuable name in the business in New England. The full name or brand which the plaintiff has adopted is 'B. C. A. Keystone,' the initials 'B. C. A.' standing for 'Boston Co-operative Association,' which was first a corporation and then a partner-

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ship, with both of which the plaintiff was connected and to whose business he has succeeded. The cigars are known in the trade and to the public as 'Keystone' or 'Keystones,' and purchasers at wholesale and retail call for and order them as 'Keystone' or 'Keystones.'

"Recently, or rather a short time prior to the bringing of this bill, the defendants began to put upon the New England market a cigar called the 'Keystone Maid,' and in some cases, where the plaintiff's cigar was called for, this has been handed out to the purchaser instead. The cigars are purchased by the defendants from a firm by the name of H. Sommer in East Bethlehem, Pa., which manufactures them, and that firm is defending this suit. The evidence tends to show, I think, and I find, that one object of the defendants and of the firm of H. Sommer, in selecting the name 'Keystone Maid,' was to avail themselves of the popularity which has attached to the plaintiff's cigars. The defendants' cigar is not as good as the plaintiff's cigar, and it is sold for a less price. The defendants conceded that if they had no right to use the word 'Keystone' they would have no right to use the words 'Keystone Maid,' contending that the effect of the prior use of the word 'Keystone' had been to make it common and public and to prevent the plaintiff from acquiring any exclusive right to its use in connection with his cigars. The defendants do not contend that they have acquired any special or exclusive right to the use of the word. But I rule that prior use of the character described above did not and would not prevent the plaintiff from acquiring a right to the exclusive use of the word in connection with his cigars in New England, and that he is entitled to be protected in such use if the trade and the public in New England have come to associate the word with and to recognize it as indicating his cigars and not the cigars of any other person. I find that the trade and the public in New England have come to associate the word 'Keystone' with the plaintiff's cigars, and to recognize it as meaning his cigars and not those of any other person. I find that the words 'Keystone Maid' as used by the defendants, tend to, and do mislead and deceive the public by causing them to believe that the cigars sold under that name are the plaintiff's cigars, and give to dealers so disposed an opportunity to palm off on to purchasers

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and the public cigars of that brand as and for the plaintiff's cigars. Instances in which such deception had been practised or attempted, both before and since the institution of this suit, were introduced in evidence before me, subject to the objection and exception of the defendants. The price of the 'Keystone Maid' cigar sold by the defendants is such that it comes into competition with the 'Keystone' cigar sold by the plaintiff. The plaintiff duly notified the defendants and the firm of H. Sommer that the sale of the 'Keystone Maid' cigar was interfering with the sale of his 'Keystone' cigar, and requested them to discontinue the use of the word 'Keystone.' They declined to do so, and stand upon their rights.

"I do not think that the plaintiff has been guilty of laches, and I think that he has not done or omitted anything which could operate as an abandonment of any rights that he might otherwise have had to the exclusive use of the word 'Keystone' in New England."

From a final decree in favor of the plaintiff, enjoining the defendants from selling or offering for sale, in the New England States, cigars in packages, marked with the word "Keystone," and awarding him damages, the defendants appealed.

The findings of the justice show the plaintiff's acquisition of a valuable trade name, by the long-continued use of the word "Keystone" in his business. It is not found that this word is a trademark, or that there has been any interference with his trademark. There has been no fraudulent imitation of his manner of packing and marking his cigars, unless he has acquired a certain right of property, which the law recognizes, in the word "Keystone," as applied to cigars of his manufacture. If he has such a right, it is a fraud upon him for the defendants to use the word in selling cigars in such a way as to mislead the public, and thus deprive him of a valuable part of the trade that fairly belongs to him, from those who wish to buy goods made at his factory. If he has no such right, it is not fraudulent for the defendants to use this word, if they avoid all other misleading methods, even though the reputation of the goods which have been marked with it, will give the defendants profits resulting indirectly from the market which the plaintiff has helped to create. Although it is sometimes said that every trademark case is

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founded upon fraud, actual or constructive, the ultimate question is whether there is a right in the plaintiff which the law recognizes and enforces. The fraud is in the violation of such a right, through deception of the public. In determining whether the plaintiff has such a right, in a case like the present, the question is whether a name which originally had no recognized value has been so used by him as to give it a value, as a designation of articles of his manufacture, whereby he may enable the public, who want his goods because of their known excellence, always to recognize them. By such a use of the name, he has given it a value and made it property, because of the meaning that is attached to it. But others may have a right to use the same name. It may be a geographical name, as in the case of *American Waltham Watch Co.* v. *United States Watch Co.* 173 Mass. 85. It is conceivable that a person may be found who bears the same name, and then there is a right to use the name in each. When there is such a conflict of rights, it is the duty of the courts so to regulate the use of the name by each, that there will be no injury, or as little injury as is possible, to the right of the other. In many cases a defendant will not suffer appreciably from a prohibition of any use of a name. In others, as in the case just referred to, it would be unjust to deprive him altogether of a use of a name which he might need for certain purposes; but he will be compelled to use it in such a way as will preserve to a plaintiff his right of property in the use which he has made of it.

If there had been no use of the name "Keystone" in the sale of cigars, except by the plaintiff and the defendants, and Sommer, the manufacturer from whom the defendants bought their cigars, the plaintiff's right would be overwhelmingly established; for the defendants and Sommer first used the word "Keystone" in 1902, and began at once to sell in New England where the reputation of the plaintiff's product, known by that name, had long been established. It becomes necessary to consider what effect the use of the word by others has upon the plaintiff's right. Much of the defendants' testimony is founded upon the manufacture, by the American Lithographic Company and its predecessors in business, of a label containing the word "Keystone," which they kept for sale, to be used upon cigars. It was proved

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that there was a well known distinction in the cigar trade between public labels and private labels. This was a public label. It was sold to anybody who would buy it, and was used, not to indicate that the cigars were manufactured by any particular firm or person, or that they were of any particular quality, but apparently merely as an attractive pictorial designation of any brand to which the manufacturer might choose to attach it. It appeared that this was purchased and used at different times by several small manufacturers, chiefly in the central part of the country. It is manifest that no rights would be acquired, either in the word or in the label, by such a use, for it was not intended to show, and did not show anything in which one could have a private right of property. If this use had been in a region in which the plaintiff's goods were generally sold, it would have had a tendency to prevent the public from concluding that the word "Keystone" designated distinctively cigars of his manufacture, and in that way might have prevented him from acquiring a right in the use of the name. Existing even in distant States, it is worthy of consideration on this point, although in the present case it is insufficient to offset the effect of the proof presented by the plaintiff. The use of this particular public label is not shown to have begun earlier than 1888, three years after the plaintiff's business was established and his trademark was registered and first used. It is plain, therefore, for these different reasons, that the use of this label did not prevent the plaintiff's acquisition of a right.

There is some evidence of a similar use of labels, seemingly to a small extent, at a little earlier time, beginning shortly before the plaintiff's sales began. But this is of a very indefinite character, and with one or two possible exceptions to which we shall refer later, it has no tendency to show a use to designate origin, or to prove that anybody acquired, or supposed he was acquiring, any right. Such a use neither gave nor took away any rights in the name, but left it as it had always been, a name which anybody might adopt. If by the adoption and long continued use of it in a part of the country where he was the only user, one should build up for it a wide reputation as designating goods of his manufacture, there is no reason why this valuable reputation should not be protected as property by the courts.

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As between two persons, each claiming to have acquired a right by use, priority is important, and ordinarily decisive. But use, of a kind which could never give a right, does not prevent another person, subsequently, from acquiring a right by a different kind of use which would result in a right. At most, it only increases the difficulty of finding, in the subsequent use, the features which are necessary requisites of its recognition as property. In such a case the conditions are similar to those existing when one, having a trademark or trade name, abandons it, and leaves the name open to a future acquisition of rights in it, as if it never had been appropriated. There is no doubt that an abandonment paves the way for future possession and property in another person. *Brower* v. *Boulton*, 58 Fed. Rep. 888. *Blackwell* v. *Dibrell*, 3 Hughes, 151; Fed. Cas. 1475. *Royal Baking Powder Co.* v. *Raymond*, 70 Fed. Rep. 376; 85 Fed. Rep. 231. *Tetlow* v. *Tappan*, 85 Fed. Rep. 774. *Macmahan Pharmacal Co.* v. *Denver Chemical Manuf. Co.* 113 Fed. Rep. 468. *Menendez* v. *Holt*, 128 U. S. 514. *Daniel* v. *Whitehouse*, 15 Rep. Pat. Cas. 134. Moreover, the evidence tends to show that all of these earlier users of the name abandoned it long ago.

The witness Zug began as a cigar manufacturer in 1886, after the rights of the plaintiff had accrued. The three sales of "Keystone" cigars, which he says he made as a jobber in 1884 or 1885, were not of goods of his manufacture, and we have no distinct information in regard to them. There is nothing to show that they were so made, or that the cigars were of such a kind, as to tend to give anybody any right of property in the label or the name. The labels which Zug afterwards used in his manufacturing business were procured of one Schmidt, who testified that he made others of the same kind for another manufacturer. This indicates that they were not used to show that the cigars came from any particular maker.

There is testimony that two or three other witnesses sold some cigars called "Keystones" before the plaintiff began; but apparently this was in a small way, and they long ago ceased to use the name. The voluminous evidence shows no such use by others as should deprive the plaintiff of a valuable property in his trade name, which has grown up in his extensive business,

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conducted at great expense, covering a large market, for nearly twenty years. The defendants did not attempt to show that anybody acquired a trademark or a trade name in "Keystone," as applied to cigars, although there is testimony that some persons have called their labels private. The defendants, and Sommer, of whom they bought, knew of the plaintiff's trade and of his claim of right before they adopted their name.

The plaintiff, having this right of property, is injured by the defendants' use of the word "Keystone," as they have used it, and we see nothing in the situation of the defendants which calls for a modification of the injunction, so as to enable them to use the word in any different way. If it appeared that they also had some right to use the word other than the general right to words and names that have not been previously appropriated, the injunction would be modified so as to preserve for each party his rights, so far as possible with a due regard to the rights of the other. This is what was done in *American Waltham Watch Co.* v. *United States Watch Co.*, *ubi supra*. It may be that there is some cigar maker whose use of this name has been such that, if he were before the court as a defendant, it would not seem proper to compel him to give it up altogether, but only so to modify it as to prevent the public from mistaking his goods for those of the plaintiff. But in the present case, as between the plaintiff and the defendants, there is no reason why the injunction should give the defendants the right to use the name upon cigars in any form.*

* The injunction contained in the decree was as follows: "That the defendants, both jointly and severally, and their principals, attorneys, agents, servants, and workmen, be and they hereby are enjoined perpetually from selling or offering for sale in the New England States, or any of them, any cigars of which the package bears the word 'Keystone' or the words 'Keystone Maid,' or any word so nearly resembling the said word 'Keystone' as to be likely to be mistaken therefor, or likely to cause the said cigars to become known in the market as 'Keystone' cigars, or as 'Keystones,' or likely to cause said cigars to be mistaken for 'Keystone' cigars, unless said cigars are made by the plaintiff, and from selling or offering for sale in the New England States, or any of them, any cigars bearing the word 'Keystone,' or the words 'Keystone Maid,' or any other word or words, mark or marks, signs or symbols likely to cause the said cigars to become known in the market as 'Keystone' cigars, or as 'Keystones,' unless said cigars are made by the plaintiff, and from using any words or devices, marks, signs, or sym-

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It is contended by the defendants that the right to use a trade name in connection with an article of commerce, to designate the goods of the plaintiff's manufacture, is a right which goes with the property and has no geographical limitations within the United States. The argument is that if it is acquired at all, it relates to the general public who may wish to buy, without reference to the boundaries of States, and that, under recognized principles, it includes a right to protection in any market in the country where the plaintiff chooses to sell his goods. So far as this contention is intended to show that the plaintiff has acquired no right to protection in the use of his trade name, we have already given reasons why it is ineffectual. It is not necessary to consider whether an injunction without geographical limitations might have been issued in favor of the plaintiff. The plaintiff has not appealed, and does not ask us to give the injunction a wider scope. The defendants cannot complain that it is too favorable to them. The general principle is stated in 2 Encyc. of Pl. & Pr. 527, that an appellant is not entitled to a reversal of a judgment or decree because it is too favorable to him, and many cases are cited in the notes. Although, in Massachusetts, an appeal from a final decree in equity brings up the whole case, the principle is applied in this class of cases. *May* v. *Gates*, 137 Mass. 389. *Moors* v. *Washburn*, 159 Mass. 172, 176. *Kane* v. *Shields*, 167 Mass. 392. It also is applied in cases of other kinds. *Vinal* v. *Spofford*, 139 Mass. 126. *Smith* v. *Dickinson*, 140 Mass. 171. *Hall* v. *Foster*, 114 Mass. 18. It is plain that this question is not open to the defendants, upon the record before us.

There are certain cases in which a court, of its own motion, may reverse or modify a judgment or decree for illegality or error. If it appears that it is not within the jurisdiction of the court, or contains provisions which are in conflict with the statutes, or against public policy, a court, on appeal, deal-

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bols in the marketing of their cigars in the New England States, or any of them, likely to suggest, facilitate, or render easy the substitution by dealers in cigars of the cigars made or sold by the defendants when the 'Keystone' cigar made by the plaintiff is ordered or called for, or cause them to be known as 'Keystone' cigars."

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ing with the whole case, may well refuse to confirm it. *Cardoze* v. *Swift*, 113 Mass. 250. *Robinson* v. *Oceanic Steam Navigation Co.* 112 N. Y. 315. *Davidsburgh* v. *Knickerbocker Ins. Co.* 90 N. Y. 526. In any view that can be taken of the law, or facts, this is not such a case. The only effect of this contention of the defendants, if sustained, is to show that the decree gives the plaintiff somewhat less than he is entitled to.

Decree affirmed.

LORING, J. The bill in the case at bar went first on the ground that the plaintiff had a technical trademark in the word "Keystone," and, second, on the ground that he was entitled to the word "Keystone" as a trade name in contradistinction to a trademark proper.

It was proved at the hearing, first, that the word "Keystone" was in common use as a public label before and at the time of its first use by the plaintiff, and second, that it was a geographical name, there being ten cities or towns in the United States, so named.

At the argument, the plaintiff's counsel, presumably for these reasons, abandoned the plaintiff's claim to a trademark proper, and undertook to support the decree appealed from on the ground that "Keystone" was a trade name, and on that ground alone.

I understand that this concession of counsel ended all discussion as to the plaintiff's right to a trademark proper in the word "Keystone," and that the only matter now for discussion is whether he has made out a case on the doctrine of a trade name as distinguished from a trademark.

In my opinion the plaintiff's right to the word "Keystone" as a trade name (using that word in contradistinction to a trademark proper) does not depend upon priority of use by the plaintiff as a distinctive mark for his goods, but upon the fact that that word (Keystone) had in fact come to have a secondary or trade meaning, namely, that cigars bearing that name are cigars of the plaintiff's manufacture.

So far as the result in the case at bar goes (to which I agree), it is of no consequence which of these two is the true doctrine. The difference between the two so far as results generally go is that if the first is the true doctrine the plaintiff, on making out

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a case establishing a trade name, is entitled to an injunction generally, as in case of a trademark; while if the second is the true doctrine, and if it appears in evidence (as it did in the case at bar) that the secondary meaning has in fact been established in one market or part of the country only, the injunction must be limited to that market or part of the country. In the case at bar that is not important, because in this case the plaintiff has not appealed from the decree granting an injunction confined to New England; but it will be of importance in future cases whether this injunction is upheld because it was rightly confined to New England or because, although wrongly so confined, no appeal was taken from it by the plaintiff. Not only is there a question of the proper injunction to be issued in future cases, but there is this further question, to wit: What is a plaintiff to prove to make out a case of a trade name as distinguished from a trademark?

For that reason it becomes important to consider what decree should have been entered and what is the principle on which the plaintiff's rights here depend.

The right of action in all cases is the same, namely: A defendant has no right to sell his goods as the goods of the plaintiff. The right of action is the same whether the plaintiff complains that the defendant has used his, the plaintiff's, trademark, or that he has used a trade name unfortunately so called, or that he has imitated his packages or that he has in terms represented that his goods are the goods of the plaintiff's manufacture.

When a plaintiff undertakes to make out such a case by proving that the defendant has used his, the plaintiff's, trademark or a colorable imitation of it, he has to prove that the mark is a valid trademark and is his. To do this he must show that he adopted as a trademark some arbitrary device not used by others, or some word which he has coined, for example, as distinctive of his goods, and that he has sold goods on the market with that device or arbitrary word. In such a case he shows that the defendant by using his mark has represented his goods to be goods of the plaintiff's manufacture.

But cases have arisen where goods have in fact come to be known as goods of the plaintiff's manufacture under a name

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which for one reason or another the manufacturer could not adopt as a trademark. For example, one cannot claim as a trademark the name of the town in which he manufactures his goods. Yet if in fact the place of manufacture becomes so identified with goods of the plaintiff's manufacture that in the trade it has come to mean not that the goods are manufactured in that place but that they are the plaintiff's goods, on proving that fact the plaintiff can have the defendant enjoined from using words which truly state where his, the defendant's, goods are made, because those words in the trade have lost their primary meaning and have acquired the secondary meaning that the goods are goods of the plaintiff's manufacture. Take as an example the first of the trade name cases, the Glenfield Starch case, decided by the House of Lords in 1872, *Wotherspoon* v. *Currie*, L. R. 5 H. L. 508. There the plaintiff's starch factory was originally situated at a place called Glenfield, and his starch became known on the market as Glenfield Starch. He moved his factory to a neighboring town, whereupon the defendant began the manufacture of starch at Glenfield, and although he did not call his starch Glenfield starch, yet he used the word "Glenfield" in connection with it in such a way that buyers would be misled into thinking it was what had come to be known on the market as Glenfield starch, and he was enjoined. It was admitted that the defendant had a right to manufacture starch at Glenfield and to advertise that fact, but since Glenfield starch had come to mean in the trade not starch made at Glenfield but starch made by the plaintiff, the defendant was enjoined from so using the words "Glenfield Starch" in his labels and advertisements as to lead the public to believe that his goods were the plaintiff's. The doctrine is put in a few words by Lord Westbury, at p. 521: "I take it to be clear, from the evidence, that, long antecedently to the operations of the respondent, the word 'Glenfield' had acquired a secondary signification or meaning in connection with a particular manufacture — in short, it had become the trade denomination of the starch made by the appellants. It was wholly taken out of its ordinary meaning, and in connection with starch had acquired that peculiar secondary signification to which I have referred." This case was followed by *Thompson* v. *Montgomery*, 41 Ch. D.

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85, on appeal, *Montgomery* v. *Thompson*, [1891] A. C. 217. In that case the defendant who manufactured ale at Stone was enjoined from selling it as Stone ale because the plaintiff proved that his ale which was made at Stone had been known so long in the market as Stone ale that those words had come to have a secondary trade meaning of ale of the plaintiff's brewing. In *Reddaway* v. *Banham*, [1896] A. C. 199, Camel Hair belting was proved to mean in the trade goods manufactured by the plaintiff and not belting made of camel's hair. Finally, in Massachusetts we have the Waltham watch case, *American Waltham Watch Co.* v. *United States Watch Co.* 173 Mass. 85. On the other hand an unsuccessful attempt was made in *Cellular Clothing Co.* v. *Maxton*, [1899] A. C. 326, to prove that cellular cloth had acquired the meaning of cloth made by the plaintiff.

In all these cases the ground on which the plaintiffs obtained relief was that they had made out in proof the fact that Glenfield starch in trade did not mean starch made at Glenfield, but starch made by the plaintiff; that Stone ale in the trade did not mean ale made at Stone, but ale made by the plaintiff; that Camel Hair belting did not mean belting made of camel's hair, but belting made by the plaintiff; and finally, that Waltham watches did not mean watches made at Waltham, but watches made by the plaintiff, or, as it was put by Holmes, J. in that case: "It was found at the hearing that the word 'Waltham,' which originally was used by the plaintiff in a merely geographical sense, now, by long use in connection with the plaintiff's watches, has come to have a secondary meaning as a designation of the watches which the public has become accustomed to associate with the name." *American Waltham Watch Co.* v. *United States Watch Co.* 173 Mass. 85, 86. To the same effect is the subsequent case of *Viano* v. *Baccigalupo*, 183 Mass. 160. In that case it was said, referring to the English cases cited above: "It is laid down in those cases that where the sole thing on which the plaintiff relies for relief against the defendant is a word common to the public, as in case of a geographical name, the plaintiff is not entitled to protection unless he proves that the name has been so exclusively identified with his own manufacture as to have acquired a secondary meaning, as was

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done in *American Waltham Watch Co.* v. *United States Watch Co.* 173 Mass. 85."

In the case at bar the evidence went no farther than to show that the words "Keystone Cigars" had the secondary or trade meaning in New England, and it follows that the injunction was rightly confined to that territory.

No question has been raised of the right of the defendants to use the word "Keystone" in connection with cigars in such a way as to show that the cigars so named are not made by the plaintiff.

Whether it is proper to say that the plaintiff in such a case as the case at bar has a right of property in such words as "Keystone Cigars," is a point on which there is a difference of opinion. See Lord Westbury in *Wotherspoon* v. *Currie*, L. R. 5 H. L. 508, 522, and Braley, J. in *Regis* v. *Jaynes*, 185 Mass. 458, on the one hand, and on the other hand Holmes, J. in *Chadwick* v. *Covell*, 151 Mass. 190, 194, and Lord Herschell in *Reddaway* v. *Banham*, [1896] A. C. 199, 209, 210. But whether it is or is not correct to say that such a plaintiff has property in such a word is not of consequence. If he has a right of property in such a word, this right of property results from his right to prevent others from using it. His right to prevent others from using it does not result from his property in it.

The fact that the word "Keystone" was a geographical name and in common use as a cigar label since 1870 prevented his adopting it as his distinctive mark for cigars of his manufacture. It did not prevent those words from acquiring in time a secondary or trade meaning, to wit, cigars made by the plaintiff.

The thing and the only thing that is material in case of a trade name is this: Does that name in the trade mean that goods to which it is attached are goods of the plaintiff's manufacture? If it does, a case of a trade name is made out although the plaintiff had no right to adopt it as his mark when he did adopt it, without regard to his having adopted it as such or having been the first to adopt it, and without regard to how many others are then using it. It is worth while to note that it appears from the report that in the Waltham watch case the word "Waltham" was not originally adopted as a distinctive mark. "It was found at the hearing that the word 'Waltham'

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which originally was used by the plaintiff in a merely geographical sense," by long use had come to mean watches made by the plaintiff. Those facts undoubtedly would raise difficulty in the proof. But it is all a matter of proof. The thing and the only thing to be proved is the trade meaning of the name. If the plaintiff proves that its trade meaning is that goods to which it is attached are goods of the plaintiff's manufacture, the plaintiff can have all other persons enjoined in using that name in selling their goods so as to mislead buyers into thinking that their goods are goods of the plaintiff's manufacture. Other persons are not prevented from using the name in question in its primary sense. Take for example the Stone ale case, the most extreme case of all because the use of the words Stone ale was absolutely forbidden; yet it was admitted that the defendant was at liberty to advertise that his ale came from Stone. See *Thompson* v. *Montgomery*, 41 Ch. D. 35, 41; *Montgomery* v. *Thompson*, [1891] A. C. 217, 222–228. In such a case the defendant has a right to use the word in its primary sense but not in its secondary sense; and it is the duty of the court to decide what use of the word is a use of it in its primary and what in its secondary sense.

As I have said, in the case at bar the evidence established the fact of a secondary meaning of the words "Keystone Cigars" in the New England States, but it went no farther. For that reason the injunction issued was right.

I am authorized to say that Justices Lathrop and Hammond concur in this opinion.

The case was argued at the bar in November, 1904, before *Knowlton*, C. J., *Morton*, *Barker*, *Hammond*, & *Loring*, JJ., and afterwards was submitted on briefs to all the justices. Mr. Justice Barker died before the decision of the case.

A. Knauth, (of New York,) (*E. N. Jones* with him,) for the defendants.

O. R. Mitchell, (*A. S. Cohen* with him,) for the plaintiff.

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CHESTER J. BAILEY & another *vs.* AGAWAM NATIONAL BANK.

Hampden. January 3, 1905. — January 2, 1906.

Present: KNOWLTON, C. J., MORTON, LATHROP, HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Easement. Deed. Equitable Restrictions. Way. Covenant, Against incumbrances. *Damages.*

The reservation in a deed of a right of way in the grantor over the land conveyed without the use of the word "heirs" reserves only a right during the life of the grantor.

In this Commonwealth a right of way cannot be excepted from the operation of a deed unless either the right of way or the way itself is in existence when the deed is made.

A deed by the owner of two adjoining lots of land conveying one of them contained this provision: "A passageway is to be kept open and for use in common between the two houses ten feet in width, five feet of said passageway to be furnished by said H. [the grantee] and five feet by me from land lying east of the land here conveyed." There was no passageway there before the deed was made. *Held,* that this provision was not a reservation nor an exception, but was a contract imposing a right in perpetuity for the benefit of adjoining lands which could be enforced in equity against any one taking with notice of it, and so created an incumbrance on the granted land. *Held, also,* that the clause should not be construed to limit the use of the way to the existence of the two dwelling houses then on the two lots, or for use in connection with a dwelling house, but that the way provided for was intended to be for the benefit of the two lots of land, and would not be abandoned or lost, if the dwelling house on the lot retained by the grantor was removed and that lot was cut up into back yards for houses fronting on a parallel street, although those houses were on land to which the right to use the passageway did not attach because not owned by the grantor when he made the deed.

A covenant against incumbrances in a deed, if an incumbrance exists, is broken as soon as made and the damages must be assessed as of the date of the deed.

THE following statement of the case is taken from the opinion of the court:

Before December, 1862, one Moore owned the parcel of land which on the plan printed on the following page is indicated by the letters A E F D. On this land were two houses, one on parcel A B C D marked I; the other, not shown on the plan, on parcel B E F C.

On December 1, 1862, Moore conveyed to one Henry in fee lot A B C D by a deed, in which, after the description of the land conveyed, is this provision: "A passageway is to be kept

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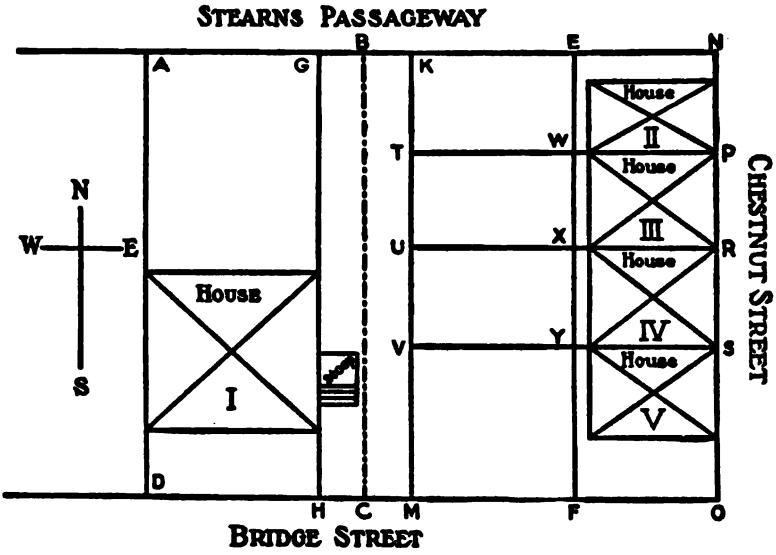
open and for use in common between the two houses ten feet in width, five feet of said passageway to be furnished by said Henry and five feet by me from land lying east of the land here conveyed. To have and to hold the aforesaid granted premises to



the said Michael Henry his heirs and assigns, to their use and behoof forever." The bill of exceptions states that "The said passageway is represented by G K M H on the plan. There was no passageway there before this deed."

By mesne conveyances parcel A B C D came from Henry to the defendant and was conveyed by it to the plaintiffs by a full warranty deed dated June 15, 1892.

This action was brought for breach of the covenant against incumbrances in that deed. The breach complained of is the existence of a passageway over the five foot strip G B C H, part of the parcel A B C D conveyed to the plaintiff by the warranty deed, which right is or is in effect appurtenant to the land B E F C.

The main defence set up is that the right to a passageway in favor of lot B E F C created by this deed over the strip G B C H was a right during the life of the grantor, and that it came to an end on his death, to wit, on December 31, 1893. The case was tried by a judge of the Superior Court without a jury. The

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judge ruled that the right of lot B E F C in the passageway G K M H was a right in perpetuity, and assessed the damages as of the date of the trial. In assessing the damages the judge proceeded on the basis that "the right of way was limited in its use to the land mentioned in the deed Moore to Henry and its use could not be extended for uses in connection with lands beyond." This refers to lot E N O F, which was not owned by Moore when he conveyed to Henry in December, 1862. The defendant also contended that the right in the passageway was a "restricted right of way to be used only for purposes incident to the use and occupation of a dwelling house on the dominant estate"; that it had been abandoned; and also that "if the court finds for the plaintiffs the damages should be assessed as of the date of the delivery of the deed." The judge found for the plaintiff and assessed damages in the sum of $950, stating:

"I have assessed the damages as of the date of the trial (see *Richmond* v. *Ames*, 164 Mass. 467) and I find that the plaintiffs' estate at the date of the trial, was diminished in value in the sum of nine hundred and fifty dollars ($950) by reason of the existence of the incumbrance.

"If the damages shall be assessed as of the date of the deed from the defendant to the plaintiffs then I find the damages were four hundred and fifty dollars ($450) to which should be added interest at the rate of six per cent per annum, viz., three hundred nineteen dollars and fifty cents ($319.50) making seven hundred and sixty-nine dollars and fifty cents ($769.50) in all."

The case is here on exceptions to the refusal to rule as requested by the defendant.

The case was submitted on briefs at the sitting of the court in January, 1905, and afterwards was submitted on briefs to all the justices.

C. H. Beckwith, for the defendant.

S. S. Taft & D. E. Tilley, for the plaintiffs.

LORING, J. [After the foregoing statement of the case.] 1. As matter of construction of the clause here in question, it was (in our opinion) the intention of the parties to it that the rights in the passageway ten feet wide, there provided for, should be rights in perpetuity, and for the benefit of the two adjoining lots of land. If this clause is to operate in favor of the grantor

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Moore by way of reservation or exception, this intention fails, so far as half the passageway, to wit, lot G B C H is concerned, for lack of the word "heirs." If it is to operate by way of reservation, that is to say, by implied grant by the grantee to the grantor, the word "heirs" is necessary. *Ashcroft* v. *Eastern Railroad*, 126 Mass. 196. It cannot operate under the Massachusetts doctrine by way of exception, because it is a new way not existing in law or in fact (that is to say, physically on the ground) at the date of the conveyance. *Simpson* v. *Boston & Maine Railroad*, 176 Mass. 359, and cases there cited.

But the clause in question does not purport to be a conveyance by way of exception or reservation; it purports to be a contract, which, as we have said, as matter of construction provides for a passageway in perpetuity for the benefit of the two adjoining lots of land. And it is a contract of which the grantee Henry's successors have taken with notice. Having taken their estate with notice of it, Henry's grantees are bound in equity to perform it. It was on this ground, (namely, that the subsequent grantee took with notice of the prior agreement imposed in perpetuity for the benefit of adjoining lands,) that the right to equitable relief by specific performance of a contract restricting the use of land in respect to the buildings to be erected on it and the use to be made of them was established when both the land benefited and that subjected to that burden had passed to grantees. *Whitney* v. *Union Railway*, 11 Gray, 359. *Tulk* v. *Moxhay*, 2 Ph. 774. And see 17 Harvard Law Review, 174.

It is on its face a novel proposition that there should be a right to a passageway by way of equitable restriction over lot A in favor of lot B. But in case the owner of lot A has made an agreement in writing, but not under seal, (and for that reason not capable of being held to be a grant,) that the owner of lot B shall have a right of way over it in perpetuity, there is nothing anomalous in holding that this agreement should be specifically enforced in equity against all taking lot A with notice of that agreement in favor of the owner of the land for the benefit of which the agreement was made. In such a case it may be said and is said that there is an equitable restriction on A in favor of B. But that is apt to be misleading. The so called equitable restriction results from the fact that equity will enforce the

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agreement against those taking with notice in favor of the then owner of the land to be benefited. Equity does not enforce the agreement because there is an equitable restriction. See *Whitney* v. *Union Railway*, *Tulk* v. *Moxhay*, and Harvard Law Review, *ubi supra*. This perhaps was lost sight of in the opinion in *Hazen* v. *Mathews*, 184 Mass. 388.

Again, there is nothing anomalous in going into equity to enforce a right to a passageway. An injunction against obstructing it is the usual remedy invoked by the owner of a legal easement to that effect. And many an indenture under seal as to setbacks and restrictions on the kind of buildings to be erected and the use to be made of them has been held to create a legal easement although the rights under them undoubtedly are usually spoken of as equitable restrictions. For instances see *Hogan* v. *Barry*, 148 Mass. 538; *Ladd* v. *Boston*, 151 Mass. 585.

It remains to say a word of the cases in which a reservation has been held to be for life only, for lack of the word "heirs."

Claflin v. *Boston & Albany Railroad*, 157 Mass. 489, was an action of tort for obstructing a right of way. To maintain a way in that case it was necessary to make out a legal easement. The same however is not true of *Ashcroft* v. *Eastern Railroad*, 126 Mass. 196, or of *Simpson* v. *Boston & Maine Railroad*, 176 Mass. 359. In *Simpson* v. *Boston & Maine Railroad* there is nothing to show that the clause which was in terms a reservation in favor of the grantor was intended to be perpetual. Neither one of these two things however is true of *Ashcroft* v. *Eastern Railroad*, 126 Mass. 196. The plaintiff in that case brought a bill in equity, and the clause was "reserving to myself the right of passing and repassing, and repairing my aqueduct logs forever, through a culvert six feet wide and rising in height to the superstructure of the railroad, to be built and kept in repair by said company." We need not now determine whether that case is to be distinguished on the ground that the doctrine now laid down was not then contended for, or is to be supported on the ground that the court will not help out a conveyance defective for lack of the word "heirs" by letting it operate as an agreement. It is settled that the word "agree" may be read "grant," and an agreement under seal construed to be a grant.

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Hogan v. *Barry*, 143 Mass. 538. *Ladd* v. *Boston*, 151 Mass. 585. But it is another matter to hold that what is defective as a grant is valid as an agreement where the parties have undertaken to make a grant. As we have said, that need not be determined now.

If the owner of lot B E F C has a right in perpetuity specifically to enforce in equity the agreement that the strip G B C H shall be kept open as a passageway for the use of that lot, there is as much an incumbrance on the strip G B C H as there would be in case the owner of lot B E F C had a legal easement over the strip G B C H as appurtenant to his lot.

2. We are of opinion that the clause in question is not to be construed to limit the use of the way to the life of the two dwelling houses then on the two lots, or for use in connection with a dwelling house, but that it was intended that the way should be for the benefit of these two lots of land. For that reason it was not abandoned or lost in 1862 when the dwelling house on the lot retained by Moore was removed and that lot cut up into back yards for houses fronting on Chestnut Street, although the right of passageway could not be used in connection with the lots on Chestnut Street not owned by Moore at the date of the deed; *Greene* v. *Canny*, 137 Mass. 64; and the presiding judge was right in so ruling. But the right to use the passageway in question attached and now attaches to all the land then owned by Moore. *Blood* v. *Millard*, 172 Mass. 65.

3. We are of opinion that the defendant was right as to the date as of which the damages are to be assessed. The ruling appears to have been made on the authority of the concluding remarks of Chief Justice Field in *Richmond* v. *Ames*, 164 Mass. 467. The true rule is laid down in that case, namely: "In an action on the covenant against incumbrances, when the incumbrance is a right of way, and has not been relinquished, the damages are that amount of money which is a just compensation to the plaintiff for the real injury resulting from the incumbrance. *Wetherbee* v. *Bennett*, 2 Allen, 428. The general rule is stated in *Harlow* v. *Thomas*, 15 Pick. 66, 69, as follows: 'The general rule in cases of this kind is plain and undisputed. If the covenantee has fairly extinguished the incumbrances, he ought to recover the expenses necessarily incurred in doing it.

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If they remain and consist of mortgages, attachments, and such liens on the estate conveyed as do not interfere with the enjoyment of it by the covenantee, he can recover only nominal damages. But if they are of a permanent nature, like the perpetual servitudes in this case, such as the covenantee cannot remove, he should recover a just compensation for the real injury resulting from their continuance. *Prescott* v. *Trueman*, 4 Mass. 627, 630.' See *Batchelder* v. *Sturgis*, 3 Cush. 201." See also *Bronson* v. *Coffin*, 108 Mass. 175; 3 Sedg. Damages, (8th ed.) § 972; Rawle, Covenants for Title, §§ 190, 191.

A covenant against incumbrances, if broken, is broken at the date of the deed (*Jenkins* v. *Hopkins*, 9 Pick. 543) and the damages accrue at that date. The damages (and we are here speaking of damages under a covenant against incumbrances as distinguished from the other covenants in a warranty deed) are a just compensation for the injury actually suffered at that time. What was probably meant by the concluding remarks of Chief Justice Field in *Richmond* v. *Ames* is that subsequent events may be put in evidence to show what the damages then incurred in fact were, and that in making up the amount of the verdict or finding, interest may be added to the amount so found, down to the date of the verdict or finding. It cannot be that the amount of damages is not fixed at the date of the breach but is dependent upon there being a rise or fall in the market value of the estate sold between the date of the breach and the date of the trial. Were it the rule, as it is in some jurisdictions, that a subsequent rise in value of an article of fluctuating value (see Sedg. Damages, § 512) may be considered in actions of trover, there might perhaps be some reason for the rule adopted by the judge in this case; but that is not so in this Commonwealth. *Kennedy* v. *Whitwell*, 4 Pick. 466. *Stone* v. *Codman*, 15 Pick. 297. *Johnson* v. *Sumner*, 1 Met. 172. *East Tennessee Land Co.* v. *Leeson*, 183 Mass. 37, 41.

The exception as to the measure of damages is sustained; all the other exceptions are overruled.

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ELEANOR E. GARDNER *vs.* BEACON TRUST COMPANY & others.

Suffolk. January 23, 1905. — January 2, 1906.

Present: KNOWLTON, C. J., MORTON, LATHROP, LORING, & BRALEY, JJ.

Equity Jurisdiction, To recover property obtained by fraud. *Bills and Notes. Guardian.*

If the owner of a mortgage and note long overdue, induced by fraudulent misrepresentations of an agent, assigns them to the agent who pledges them to a trust company to secure money borrowed by him personally, and the trust company takes the assignment in good faith for value and without notice of any fraud or defect in title, the owner of the mortgage and note cannot maintain a suit in equity against the trust company to compel their reassignment.

A guardian has authority to sell and transfer personal property of his ward without obtaining a license from the Probate Court under the provisions of R. L. c. 145, § 85. That statute merely enables a guardian to apply for a license for his own protection and that of his sureties if he chooses to do so.

MORTON, J. This is a bill in equity brought by a minor, by her next friend and guardian, to compel the defendant the Beacon Trust Company to assign and deliver to her a mortgage and the note thereby secured alleged to have been fraudulently obtained from the plaintiff's guardian by one Edwin M. Thayer, since deceased, and fraudulently assigned by him to the trust company. As to certain of the defendants the bill was dismissed, and a decree was entered in favor of the plaintiff against the trust company and other defendants. The case is here on appeal by the trust company. All of the evidence is reported.

Briefly stated the facts are as follows: In January, 1903, the plaintiff was the owner of a mortgage, and the note thereby secured, for $1,500, on land in Quincy, given by the defendant Brown to one Hattie L. Carr, and transferred by successive assignments to the plaintiff. Her mother, Mary E. Gardner now Mary E. Wales, was her guardian. The note and mortgage had been long overdue. By means of fraudulent misrepresentations that the owner of the equity wished to pay off the mortgage, Thayer obtained from the plaintiff's guardian an

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assignment of the note and mortgage to himself, and subsequently assigned them to the trust company as security for a note of $2,000 for money borrowed by him of the company. The trust company took the assignment in good faith for value, and without any notice of Thayer's fraud or of any defect in his title, unless the fact that it took it when the note was overdue constituted such notice.

We assume in favor of the plaintiff that the fact that the note was secured by mortgage does not affect its character as an overdue negotiable instrument when taken by the trust company, although it is said in *Murphy* v. *Barnard*, 162 Mass. 72, 75, that there is a distinction between the purchase of ordinary commercial paper and that of notes known to be secured by a mortgage of real estate, though bought as negotiable paper. See *Fish* v. *French*, 15 Gray, 520; *Vinton* v. *King*, 4 Allen, 562; *Willcox* v. *Foster*, 132 Mass. 320; *Bacon* v. *Abbott*, 137 Mass. 397. But the note did not cease to be property or to be negotiable because overdue. *Baxter* v. *Little*, 6 Met. 7. *Fisher* v. *Leland*, 4 Cush. 456, 458. *Leavitt* v. *Putnam*, 3 Comstock, 494. And the question is, whether, assuming for the moment the validity of the transfer by the plaintiff's guardian to Thayer, which will be considered later, the fact that the note and mortgage were overdue when the trust company took them so affected its title as to postpone its right to that of the defrauded owner. The general rule is thus stated by Lord Herschel in *London Joint Stock Bank* v. *Simmons*, [1892] A. C. 201, 215: "The general rule of the law is, that where a person has obtained the property of another from one who is dealing with it without the authority of the true owner, no title is acquired as against that owner, even though full value be given, and the property be taken in the belief that an unquestionable title thereto is being obtained, unless the person taking it can show that the true owner has so acted as to mislead him into the belief that the person dealing with the property had authority to do so. If this can be shown, a good title is acquired by personal estoppel against the true owner." He then goes on to say that there is an exception in the case of negotiable instruments, manifestly meaning those not yet due, and that as to them, any person in possession of them can convey a good title even if acting in fraud of the true

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owner. This is the only exception mentioned by him to the general rule which he lays down, and which would seem, therefore, to have been regarded by him as applying to overdue negotiable notes as well as to other property when circumstances brought them within it. Applying the rule thus laid down, or the rule that, where one of two innocent persons must suffer in consequence of the fraud of another, the loss must fall upon the one who by his trust and confidence has enabled the perpetrator of the fraud to commit it (*Easter* v. *Allen*, 8 Allen, 7; *McNeil* v. *Tenth National Bank*, 46 N. Y. 325), it would seem plain that the loss in this case should fall upon the plaintiff, unless the fact that the note and mortgage were overdue makes a difference. She had assigned the note and mortgage to Thayer by an instrument valid upon its face, and had delivered possession of them to him. As a consequence of her conduct he had possession of them as apparent owner with full dominion over the property which they represented. This apparent ownership was obtained from the guardian by Thayer's fraud, it is true; but although that would have enabled her to avoid the transaction as between her and him so long as the note and mortgage remained in his hands, his apparent ownership was not affected thereby.

Does, then, the fact that the note and mortgage were overdue when the trust company took them make a difference? The purchaser of an overdue negotiable note takes it subject to all the equities, if any there are, attached to it at the time of the transfer in favor of the maker, the owner, or of third parties. *Vinton* v. *King*, 4 Allen, 562. *Vermilye* v. *Adams Express Co.* 21 Wall. 138. *In re European Bank*, L. R. 5 Ch. 358. *In re Overend*, L. R. 6 Eq. 344. If there are no equities attached to the note the purchaser gets as good a title after as before maturity (*In re Overend*, *supra*, 360), and it makes no difference that the note is dishonored. If there are equities attached to it, he takes it subject to them. This is what is meant when it is said that the purchaser has no better title, legal or equitable, than his transferrer had, and that the note is subject in his hands to the same infirmities of title as against the true owner and to the same defences as against the maker which it was subject to in the hands of his transferrer. 1 Dan. Neg. Instr. (3d ed.) §§ 724

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et seq. If for instance an overdue note is stolen from the owner, a subsequent purchaser acquires no title as against the true owner (*Vermilye* v. *Adams Express Co.*, *supra*); if an overdue note has been paid by the maker and is fraudulently put in circulation by the payee, a purchaser, though for value and in good faith, takes it subject to the defence of payment by the maker. In such a case the very fact that the note is dishonored is sufficient to put the purchaser upon inquiry as against the maker. *Gold* v. *Eddy*, 1 Mass. 1. *Brown* v. *Davies*, 3 T. R. 80. *Losee* v. *Dunkin*, 7 Johns. 70. But the case is very different where the owner of an overdue note transfers it under circumstances which enable his transferee to deal with it though obtained by fraud as if he were the true owner, and when an innocent purchaser for value takes it from such transferee before the transfer has been avoided. In such a case no equity attaches to the note in favor of the true owner as against the innocent purchaser for value, since it was by his own act that the perpetrator of the fraud was enabled to commit it. The true owner of an overdue note may deal with it as with any other property, and the mere fact that the note is overdue does not in such a case, in the absence of anything in the transaction to suggest suspicion, put a purchaser upon inquiry any more than a purchaser is bound in any other case to inquire into the title of his vendor. See *White* v. *Dodge*, 187 Mass. 449. The possibility that the title may have been obtained by fraud exists in all cases. But that is not enough to put a purchaser upon inquiry. Any other view would put upon the innocent purchaser for value of overdue negotiable paper the onus of a defective title no matter how much he may have been misled by the conduct of the true owner. We do not think that such is the law. *Cochran* v. *Stewart*, 21 Minn. 435, 438, 440. *Moore* v. *Moore*, 112 Ind. 149. *Neuhoff* v. *O'Reilly*, 93 Mo. 164. *Etheridge* v. *Gallagher*, 55 Miss. 458. *Connell* v. *Bliss*, 52 Maine, 476. *Eversole* v. *Maull*, 50 Md. 95. Jones, Mortgages, § 841. Ames Cases on Trusts, (2d ed.) 310. In *Foley* v. *Smith*, 6 Wall. 492, the above principle was recognized, though it was held that the facts did not bring the case within it. So far therefore as the plaintiff relies upon the fact that the note and mortgage were overdue when taken by

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the trust company, her contention must fail. The note being dated before January 1, 1899, the negotiable instruments act does not apply. See R. L. c. 73, § 211.

The plaintiff, relying upon R. L. c. 145, § 35, further contends that the guardian could not transfer the note and mortgage without a license from the Probate Court, which she did not have. That statute provides that upon the application of the guardian, or of any person interested in the estate of the ward, the Probate Court may authorize the guardian to sell and transfer any personal property held by him as guardian, and invest the proceeds in such manner as shall be most for the interest of all concerned. The provision comes in substance from St. 1820, c. 54, § 3, except that it was there provided that the application should be made to the Supreme Court of Probate. St. 1820, c. 54, § 3. Rev. Sts. c. 79, § 21. Gen. Sts. c. 109, § 22. Pub. Sts. c. 139, § 38. R. L. c. 145, § 35. But the object of this provision was and is, we think, to furnish a way in which a guardian could protect himself and his sureties by obtaining in advance a judicial approval of the sale and investment, and not to require him to obtain a license from the court in order to sell and transfer personal property of his ward. This was the view taken by the commissioners on the revision of the statutes in 1834, (Report of Commissioners on Rev. Sts. c. 69, § 11, note, and c. 79, § 22, note,) and is the construction which was in effect given to a similar statute in Mississippi by the Supreme Court of the United States in *Maclay* v. *Equitable Assurance Society*, 152 U. S. 499, and to our own statute by Woodruff, J. in *Wallace* v. *Holmes*, 9 Blatch. 65. The St. 1817, c. 190, § 35, which provided that stock in the public funds, shares in banks, insurance offices and other corporations, and loan office certificates could not be transferred by a guardian without a license from the Probate Court was repealed by the Revised Statutes, (Rev. Sts. p. 825,) and, though various provisions in that act were re-enacted, § 35 was not and has not been since. If the Legislature had had any intention that a guardian should obtain leave of the Probate Court to sell and transfer personal property of his ward, it would seem that this provision would have been kept alive or subsequently re-enacted. The case of *Ex parte Blair*, 13 Met. 126, which held that an executor or administrator could not

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assign a mortgage without license from the Probate Court, rested upon statutory provisions which were applicable to executors and administrators alone, (Rev. Sts. c. 65, §§ 11, 14; *Burt* v. *Ricker*, 6 Allen, 77,) and which were changed by St. 1849, c. 47, re-enacted in Gen. Sts. c. 96, § 12, Pub. Sts. c. 133, § 9, and R. L. c. 150, § 10. In *Atkinson* v. *Atkinson*, 8 Allen, 15, the shares were transferred by the guardian without a license from the Probate Court. The decision was not, however, put on that ground as it would have been if a license had been necessary in the opinion of the court, but on the ground that the transferee took the shares with knowledge of all the facts which showed that the shares were transferred by the guardian to a surety on his bond for the purpose of indemnifying him as such surety; in other words, that they were transferred by the guardian on his personal account and were taken by the transferee with knowledge of that fact. The case of *O'Herron* v. *Gray*, 168 Mass. 573, relied on by the plaintiff, is very different from this. That was the case of a felonious appropriation by the cashier of a bank of certificates of shares, which had been wrongfully pledged by a guardian to secure his own debt, and had been left in the custody of the bank after the debt was paid, and had been taken by the cashier and used as security for his own indebtedness. The guardian was ignorant of the whole transaction and did nothing whatever to mislead the parties to whom the cashier pledged the certificates.

The result is that so much of the decree as adjudges that the mortgage remains, and still is the property of the plaintiff, and orders the trust company to assign and convey its interest in the same to her is reversed and the rest is affirmed.

So ordered.

F. G. Cook, (*J. J. Dolan* with him,) for the Beacon Trust Company.

R. G. McClung & G. F. Wales, for the plaintiff.

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DAVID J. INGRAHAM *vs.* PULLMAN COMPANY

Suffolk. March 22, 1905. — January 2, 1906.

Present: MORTON, LATHROP, HAMMOND, & BRALEY, JJ.

Damages, In contract, remoteness. *Carrier*, Of passengers. *Proximate Cause.*

If a passenger holds a ticket from a parlor car company entitling him to a drawing room in a certain car on a train leaving a certain city at 9.40 P. M. and due at his destination at 3.45 A. M. with the privilege of occupancy until 7 A. M., and there turns out to be no drawing room in the car designated, and if the car company offers him a drawing room equal to that called for by his ticket which will be ready for occupancy at 10 P. M. on a train leaving at 12.30 A. M. and arriving at 7.19 A. M., and the passenger refuses this offer, and also refuses the offer of a section in the car named by his ticket, and sits up all night in an ordinary passenger car on the same train, thereby aggravating a valvular disease of the heart from which he suffers, and in consequence is made ill and temporarily unable to work, he can recover from the car company only nominal damages, the direct and proximate cause of his illness being his refusal to accept the accommodations offered to him and not the car company's breach of contract in failing to furnish him with a drawing room in the car named on his ticket.

In an action to recover damages for the plaintiff's illness and consequent loss of work alleged to have been caused by a breach of contract on the part of the defendant, the defendant can introduce evidence to show that the alleged consequences of the breach of contract by the defendant could have been avoided by the exercise of reasonable care and prudence on the part of the plaintiff.

MORTON, J. The plaintiff had a first class ticket over the Pennsylvania Railroad from Jersey City to Washington, and purchased of the defendant a ticket for a drawing room in a car forming part of a train which was to leave Jersey City on the night of January 22, 1902, at 9.40 P. M. arriving at Washington at 3.45 A. M. The car was described on the ticket as Car No. 1, and the ticket permitted the drawing room to be occupied till 7 A. M. the next morning. The plaintiff and a friend who was to accompany him presented themselves at the train, and were told by the conductor that there was no drawing room in Car No. 1 on that train. A section was offered to the plaintiff which he declined, and entered an ordinary passenger car not belonging to the defendant which had no sleeping accommodations, and travelled therein to Washington, sitting up all night. There was evidence tending to show that the plaintiff had a valvular dis-

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ease of the heart which was aggravated by his sitting up all night, and that, in consequence thereof, he was sick after his arrival at Washington, and unable to work regularly till March 1. It appeared that the next train for Washington left at 12.30 A. M. arriving there at 7.19 A. M., and the defendant was permitted, subject to the plaintiff's objections and exceptions, to introduce evidence tending to show that the plaintiff was offered a drawing room in a car attached to that train which would be ready for occupancy at ten o'clock, and which was in all respects equal to the drawing room called for by his ticket, but he refused to accept it. Similar testimony was introduced, also subject to the plaintiff's objections and exceptions, of other accommodations offered to him and refused. The jury returned a verdict for the plaintiff for nominal damages, and the case is here on exceptions by the plaintiff to the introduction of the evidence above referred to, and to the refusal of the judge to give certain rulings that were requested, and to the charge so far as inconsistent with the rulings thus asked for.

It is clear that there was a breach of its contract by the defendant. And if the injury to the plaintiff's health was the direct and proximate result of the breach, there would be strong ground for holding that the defendant was liable in damages therefor, and for any inconvenience to which the plaintiff was subjected. There was testimony tending to show that drawing rooms were largely used by invalids, and possible injury to health by reason of a breach of the contract might, therefore, fairly be presumed to have been within the contemplation of the parties to it. But in the present case the injury to the plaintiff's health was not the direct and proximate result of the breach by the defendant of its contract. There was an intervening cause, namely, the plaintiff's refusal to accept the accommodations, which the jury must have found were tendered to him, and his conduct in going into an ordinary passenger car, and sitting up during the night's ride to Washington. *Dodd* v. *Jones*, 137 Mass. 322. When he found that he could not get the drawing room for which his ticket called, he was bound in the exercise of ordinary prudence to adapt himself as well as he reasonably could, considering his health, business and other matters, to the circumstances in which he was placed, and to avail himself, within those

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limits, of such accommodations as were offered by the defendant. In other words it was incumbent on him to do what he reasonably could, taking all the circumstances into account, to lessen the injury and not to aggravate it. *Loker* v. *Damon*, 17 Pick. 284. *Sutherland* v. *Wyer*, 67 Maine, 64. 1 Sedg. Damages, (8th ed.) §§ 201 *et seq.* The evidence that was objected to was rightly admitted for the purpose of showing that the alleged consequences of the breach of its contract by the defendant could have been avoided by the plaintiff by the exercise of reasonable care and prudence on his part. We see no error in the instructions that were given, or in the refusal to give those that were requested.

Exceptions overruled.

J. J. Feely, (*R. Clapp* with him,) for the plaintiff.

B. N. Johnson, (*R. L. Dana* with him,) for the defendant.

ANTHONY AND SCOVILL COMPANY *vs.* METROPOLITAN ART COMPANY & others.

Suffolk. March 29, 1905. — January 2, 1906.

Present: KNOWLTON, C. J., MORTON, LATHROP, HAMMOND, & BRALEY, JJ.

Corporation, Foreign, statutory liability of officers and stockholders. *Equity Pleading and Practice.*

The liability of the officers and stockholders of a foreign corporation having a usual place of business in this Commonwealth for the debts of such corporation under R. L. c. 126, § 18, if they have participated in a conveyance to the corporation of property at an unfair valuation in payment for capital stock of the corporation, is not rendered less enforceable by the provision of § 19 of the same chapter excepting persons so liable from the operation of the fourth clause of R. L. c. 110, § 58, while making them subject to the rest of §§ 58–68 of that chapter, the fourth clause being excepted because it provides that in the case of domestic corporations, where property mentioned in the statement required by another section of that statute is not conveyed and taken at a fair valuation, only the officers signing the statement shall be liable, while c. 126, § 18, provides that in the case of foreign corporations all officers and stockholders participating in a conveyance to the corporation at an unfair valuation in payment for capital stock shall be liable.

In a suit in equity to establish the individual liability of officers and stockholders of a foreign corporation having a usual place of business in this Commonwealth

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under R. L. c. 126, § 18, for the debts of the corporation on the ground that they have participated in a conveyance to the corporation of property at an unfair valuation in payment for capital stock of the corporation, it is no defence that the defendants in signing a certificate of the valuation found to be unfair did so without any fraudulent intent and without actual knowledge that any statement contained in it was false, their liability under the statute depending not on fraudulently signing a certificate but on participating in a conveyance of property at an unfair valuation in payment for capital stock, and it being made the duty of such participants to know that the valuation is fair.

In a suit in equity to establish the individual liability of officers and stockholders of a foreign corporation having a usual place of business in this Commonwealth under R. L. c. 126, § 18, if the bill states facts showing that the defendants participated in a conveyance to the corporation of property at an unfair valuation in payment for capital stock of the corporation, a further allegation that the defendants made a false and fraudulent certificate as to the valuation is immaterial and may be disregarded.

KNOWLTON, C. J. This is a bill in equity filed in the Superior Court on July 15, 1903, by the plaintiff in behalf of itself and other creditors, seeking to establish the individual liability of the defendants, David Benshimol as president, Charles H. Lerned as treasurer, and Abram Lipp, who, with the other two, constituted a majority of the board of directors, for the debts of the defendant, the Metropolitan Art Company, by reason of the fact that the capital stock of the defendant corporation had been paid in by a conveyance to the corporation of property taken at an unfair valuation, and a certificate thereof had been made which the defendants knew to be false, contrary to the provisions of the R. L. c. 126, § 18.

In the Superior Court, the judge before whom the case was tried found that the defendant corporation was organized under the laws of the State of Maine on July 8, 1902, with a capital stock fixed at $100,000, and on or about that date first established a usual place of business in Boston, in this Commonwealth; that on October 1, 1902, the defendant corporation was indebted to the plaintiff for goods sold and delivered by the plaintiff to the defendant corporation; that on December 30, 1902, the plaintiff brought an action against the defendant corporation, and afterwards recovered judgment for a sum stated, which judgment remains unsatisfied; that an execution was issued and a demand was made on the officers, and that on May 9, 1903, the execution was returned unsatisfied.

The judge further found as follows: "Defendant Benshimol

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was the president and a director, and the defendant Lipp was a director of said corporation from its organization until the 7th day of October, 1902, when each of them resigned his said offices, parted with all of his stock, and thereafter was in no way interested or concerned in said corporation or connected with it. These three individuals, hereinafter called the defendants, were a majority of the board of directors from the organization of the defendant corporation until said 7th day of October, 1902; and on the 9th day of July, 1902, they as said majority of the directors took the stock, merchandise, machinery, franchises, and all property of the firm of Benshimol, Lerned and Lipp, doing business as the Metropolitan Art Company, a partnership composed of the defendants, in payment for all the capital stock of said corporation, at a valuation of one hundred thousand dollars, and issued in exchange for said property all the capital stock of said corporation, being of the par value of one hundred thousand dollars; and on the 9th day of July, 1902, the defendants, being then the president, treasurer, and a majority of the directors of said corporation as aforesaid, made, signed, and swore to the certificate, and on the 23d day of said July, caused said certificate so signed and sworn to to be filed in the office of the secretary of the Commonwealth. The capital stock of said corporation was paid in by the conveyance to said corporation of said property at said valuation of one hundred thousand dollars; and this was done and said valuation was made and fixed on by the defendants. The valuation of one hundred thousand dollars put upon said property as aforesaid was an unfair valuation. Said property could not have been fairly valued at that time at more than fifty thousand dollars; and its real market value was then much below even this last named sum. But it did not appear and I do not find that the defendants or either of them signed or filed said certificate with any fraudulent intent or with actual knowledge that any statement therein contained was false or had any wilful intent to make any false statement, though they had reasonable cause to know and ought to have known that said valuation was an unfair one."

On January 2, 1905, a decree was entered establishing the debt, and ordering the three personal defendants jointly and severally to pay the debt with costs. The case is before us on

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the appeal of the three defendants from this decree. Section 18 of the R. L. c. 126, reads as follows: "If the capital stock of a foreign corporation which is subject to the provisions of the preceding section has been paid in by a conveyance to the corporation of property, real or personal, at an unfair valuation, the officers, members or stockholders who participate in such conveyance or in the taking of such property at such unfair valuation, or who have purchased or received shares with knowledge of said fact, shall be jointly and severally liable for its debts or contracts." The finding of the judge brings the case clearly within the provisions of this section. Section 19 of the same chapter reads as follows: "The extent, conditions and manner of enforcing the liability imposed by the preceding two sections shall be the same as is provided in the case of domestic corporations by sections fifty-eight to sixty-eight, inclusive, of chapter one hundred and ten, except clause four of said section fifty-eight. No officer, member or stockholder shall be liable under the provisions of the preceding two sections for any bonded or mortgage debt of corporations."

The first contention of the defendants is that § 18 is not enforceable because of the exception stated in § 19. But this exception of clause four of § 58 leaves all the general provisions for the enforcement of the liability in full force. The reason for the exception in this section is the same as that for the same exception in § 17 of this chapter, which establishes a liability upon the officers and stockholders of foreign corporations for the debts and contracts of these corporations, on the same conditions and in the same manner as is provided for domestic corporations by §§ 58 to 68 of c. 110, with this exception. The reason is, that this liability is expressly stated in § 18 above quoted, in different terms from the similar liability for debts of domestic corporations stated in c. 110, § 58, cl. 4. Only the officers of domestic corporations who sign the statement for filing, when the property mentioned in the statement was not conveyed or taken at a fair valuation, are liable for the debts of the corporation; while under § 18 above quoted, the officers, members or stockholders who participate in the conveyance, or who have purchased or received shares with knowledge of the fact, are liable for the debts. This difference in liability makes the

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exception in §§ 17 and 19 necessary. There is no good ground for the contention that § 18 is not enforceable because of this exception.

The other contention of the defendants is that the liability does not exist in this case because the judge has failed to find that the defendants, in subsequently filing the certificate required by the statute, acted with a fraudulent intent, or with actual knowledge that any statement therein contained was false, or with a wilful intent to make a false statement, although they had reasonable cause to know and ought to have known that the valuation was an unfair one. It is to be noticed, first, that the liability under § 18 is not for fraudulently signing a certificate, but for participating in a conveyance of property to the corporation, to be taken as capital stock at an unfair valuation. The Legislature has seen fit to make such participation by officers and members of a foreign corporation a sufficient ground for holding them for the corporate debts. The law puts upon them the duty of seeing that property which they convey to be taken for capital stock of a corporation is conveyed at a fair valuation. Under this section it is not necessary to prove actual knowledge that the property is valued too high. When they are engaged in a transaction upon which so much depends, it is their duty to know that the corporation is not left deficient when it ought to receive its capital in full.

No question of pleading has been raised, and we are of opinion that the allegations of the bill are sufficient. That a conveyance was made to the corporation by the defendants, as individual owners, of property which they bought for the corporation as directors, at the price of $100,000, when its fair value was not more than $10,000, is plainly stated in the bill. This, with the other averments, covers all that is necessary to entitle the plaintiff to relief. The fact that the bill goes further, with averments in regard to the making of a false and fraudulent certificate, is immaterial.

Decree affirmed.

W. B. Orcutt, (*D. Benshimol* with him,) for the defendants Lipp, Benshimol and Lerned.

E. F. McClennen, (*W. S. Heilborn* with him,) for the plaintiff.

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JOHN J. MEE *vs.* WILLIAM H. FAY.

Hampden. September 26, 1905. — January 2, 1906.

Present: KNOWLTON, C. J., LATHROP, HAMMOND, LORING, & BRALEY, JJ.

Guardian. Fraternal Beneficiary Corporation. Trust.

A guardian cannot maintain an action to recover property belonging to his ward. Such action must be brought in the name of the ward.

One holding a certificate for $1,000 of life insurance in a fraternal beneficiary corporation, his wife who was named as beneficiary having died, wished to take out a new certificate for the benefit of his grandchildren, and told one F. that he desired him to receive the money and use it for their care and education as he did not wish it to be within the control of his son, their father. He took out such a certificate payable to F., who was not of a class entitled to be a beneficiary, "as guardian of my grandchildren H. and L." On the death of the insured the $1,000 was paid by the company to F. who never had been appointed guardian of the grandchildren. He announced in a letter to the father of H. and L. that the money was in his possession, but refused to pay it over. *Held*, that the grandchildren, who were minors, could not maintain an action at law against F. for the money, because it was held by him in trust, and *semble* that an amendment into equity would not help them, there being no ground for a present termination of the trust.

BRALEY, J. This is an action of contract in which the plaintiff, duly appointed under R. L. c. 145, § 19, the guardian of Harold Fay and Lillian Fay, sues to recover as a part of his wards' estate a fund in possession of the defendant, who in defence claims to hold it on a trust for their benefit. At a trial without a jury in the Superior Court this defence prevailed, and the case is before us on a report of the presiding judge.

The first embarrassment arises from want of proper parties plaintiff, but this difficulty is removed because the report states that if it becomes necessary the plaintiff may amend by substituting his wards, by whom alone the action can be maintained. *Lombard* v. *Morse*, 155 Mass. 136, 137. Treating the case as having been properly amended we pass, therefore, to the principal question, which is the defendant's title to the money in controversy.

It appears that one Michael Fahey became the holder of a certificate of insurance for $1,000, payable to his wife as beneficiary,

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which was issued by the A. O. H. Widows' and Orphans' Fund, a domestic corporation authorized to engage in fraternal insurance. Upon her death, desiring to obtain a new certificate in which his grandchildren, the true plaintiffs here, should be the beneficiaries, he stated to the defendant that he desired him to receive the money and use it for their care and education, as he did not wish it to be within the control of his son, who was their father. He then applied to the secretary of the order for a new certificate, which was issued and made payable to the defendant "as guardian of my grandchildren Harold and Lillian Fay." This transaction took place on July 24, 1900, and, Michael Fahey having died on September 8, 1900, on January 22, 1901, the amount of this insurance was paid to the defendant, although not then nor subsequently appointed guardian of the children.

The defendant himself did not sustain such a relation to the deceased member as to bring him within the class to whom a death benefit could lawfully be paid. St. 1899, c. 442, §§ 11, 15. *Daniels* v. *Pratt*, 143 Mass. 216. *Lavigne* v. *Ligue des Patriotes*, 178 Mass. 25, 28.

But although inartificially expressed, the object which the decedent sought to accomplish is plain. It was his intention that these grandchildren should have the sole benefit of the insurance, and by intendment of law they alone are to be deemed the beneficiaries. *American Legion of Honor* v. *Perry*, 140 Mass. 580. *Dean* v. *American Legion of Honor*, 156 Mass. 435, 438.

This designation was made by the insured member in his lifetime, and, from the silence of the record to the contrary, it should be inferred that it was rightly approved by the officers authorized to act for the corporation, and upon his death was considered by them as sufficient to authorize payment of the money. See *Daniels* v. *Pratt*, *ubi supra*, at pages 221, 222.

If, however, the statute is thus satisfied, it does not follow as between the parties that the defendant has received the money to their immediate use. While ordinarily he would hold it subject to their legal title, there was evidence admitted under the plaintiff's exception and to which we have already adverted showing why Fahey caused the insertion in the certificate of the defendant's name. This testimony was competent, for it has

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long been settled that a trust in personal property may be established by oral evidence, and when found to exist is to be administered according to the directions of the founder. *Bancroft* v. *Russell*, 157 Mass. 47. *Peck* v. *Scofield*, 186 Mass. 108, 111, and cases cited.

The language of the certificate, with this precatory request, still kept the fund within the class who could take under the statute; for the contemporaneous acts that form the transaction, when combined, constitute a complete scheme which might have been set forth in the certificate by stating that the amount payable under it upon his death should go to his grandchildren by name, but should be payable to the defendant, who was to hold the fund in trust, and expend it for their care and education. *Kendrick* v. *Ray*, 173 Mass. 305.

In such a case the legislative intention that fraternal insurance on the lodge system should not be made the subject of speculation by strangers upon the life of the assured or liable for his debts, shown by confining the beneficiaries to relatives or persons dependent upon the assured for their support, who must be designated at the time the certificate issues, is not violated by a construction which permits an equitable right of this nature to be attached to the death benefit by the member whose life is insured. See *American Legion of Honor* v. *Perry*, 140 Mass. 580, 589; *Daniels* v. *Pratt*, *ubi supra*.

On receiving the money the defendant announced in a letter to the father of the minors that it was in his possession, and in his answer in this case declares that the amount is held "for . . . Lillian and Harold Fay by reason of said trusteeship, and by reason of an oral agreement and trust made . . . with Michael Fahey."

The essential elements of a valid trust in personalty are thus found, and as the defendant holds the property for them in a fiduciary capacity they are not entitled to its possession. *Gerrish* v. *New Bedford Institution for Savings*, 128 Mass. 159. *Davis* v. *Coburn*, 128 Mass. 377, 382. *Peck* v. *Scofield*, *ubi supra*.

It is, however, suggested that, if this conclusion is reached, an amendment should be permitted changing the present action from law into equity, but by the terms of the report this privilege has not been reserved. If it had been, the plaintiffs upon such

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amendment being allowed would be no nearer obtaining the money, for the proper proceeding, under R. L. c. 159, § 1, is to have the trust declared, and the defendant as trustee directed to execute it. *Chace* v. *Chapin*, 130 Mass. 128.

By the terms of the report there must be

Judgment for the defendant.

J. H. Rickard, Jr., for the plaintiff.

D. A. Coyne, for the defendant.

JOHNSON J. SIPLEY *vs.* ALBERT STICKNEY.

Berkshire. September 26, 1905. — January 2, 1906.

Present: KNOWLTON, C. J., LATHROP, HAMMOND, LORING, & BRALEY, JJ.

Contract, Performance and breach, Implied: common counts.

One cannot recover on a contract if he intentionally has failed to perform a part of it, although the part which he has failed to perform may not be of the essence of the contract.

A person employed to carry on a farm in the absence of the owner, whose duty it has been to render true and accurate accounts of the expenses of the farm, can not recover against his employer for his services, if he intentionally has deceived his employer as to the expenses incurred in running the farm by holding back certain bills which ought to have appeared in his accounts, even if this breach of his duty has caused no loss to his employer.

THE following statement of the case is taken from the opinion of the court:

This case comes before us on exceptions to the charge to the jury in an action of contract in which the plaintiff had a verdict.

The defendant is a lawyer, residing and practising in the city of New York. From 1900 to 1902 he owned a farm of some four hundred acres in Sheffield, Massachusetts, on which he had a herd of from twenty-five to thirty milch cows, seventeen heifers and two bulls. He was at the farm but little, and employed the plaintiff in July, 1900, to take charge of it for him. The plaintiff resigned his position in July, 1902, but stayed on until October 10, apparently to accommodate the defendant, who could

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not get another farmer at the time. This action was brought by the plaintiff to recover $193.73, a balance due him for wages for August, September, and the ten days in October on which he worked, amounting to $97.12, together with sixty-one items of cash paid out in August and September, amounting to $267.51, after crediting the defendant with nine items of cash received during August and September for the products of the farm, amounting to $170.90. All the items, with the exception of the three for wages, were agreed to be correct; that is to say, the defendant admitted that he owed the plaintiff $96.61, the balance of cash expended by the plaintiff, but contested his liability for the wages amounting to $97.12.

The defendant set up in defence to the claim for the wages that the plaintiff in his monthly accounts had intentionally misstated the debts incurred in running the farm, to deceive the defendant. The presiding judge charged the jury that "the plaintiff in undertaking to manage the farm of the defendant was bound to act with diligence, integrity and skill. That is a general obligation. It is the obligation of any one who undertakes any employment. It is the same in other concerns, other business, in other employment as it was in this. It is a general obligation on the part of any person who undertakes an employment to act with diligence, integrity and skill. It was the undertaking, it was the duty of Sipley in his dealings with the defendant Stickney to so act, and it is upon the plaintiff in this case to satisfy you that he did so act. The burden of proof is upon him to entitle him to prevail in this action to satisfy you that he did act in his dealings with Mr. Stickney, the defendant, with diligence, integrity and skill, and to the extent that he failed in either or all of the three respects which I have enumerated, in so far as he failed in either one or more of those respects and injury resulted to Mr. Stickney, the defendant in this case, there is a right to use that injury in reduction of this claim, and if such injuries are sufficient to extinguish the claim then your verdict is for the defendant in this case." To this the defendant excepted, contending "that unless the plaintiff satisfied the jury that the plaintiff rendered his services with fidelity, the defendant was entitled to a verdict without regard to the question whether or not damage resulted from the plaintiff's failure to perform." The judge also instructed

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the jury: "If you find that the plaintiff, Sipley, was bound to render true and accurate accounts by reason of any arrangement between the parties of the farming business in his hands, of the payments and receipts, and if you find upon the evidence that there was failure to render such accounts and especially if you find that he deceived the defendant as to the condition of the accounts, that fact will be a sufficient ground in law for your refusal to allow him any compensation, if you find that such failure or such deception injured the defendant to an extent sufficient to extinguish his claim." To this the defendant excepted, contending "that it was immaterial whether or not damage resulted from the failure of the plaintiff to render true accounts; but that if the plaintiff rendered accounts which were not true or failed to render accounts, he had failed to perform his contract and was not entitled to recover." There were other instructions and other issues and other exceptions, but the only exceptions insisted upon at the argument are those above stated.

The evidence which gave rise to the parts of the judge's charge now attacked was in substance this: The result of the conduct of the farm had been disappointing in the crops raised, in the deterioration of the stock, and particularly in the amount of money paid out. It appeared that the plaintiff rendered accounts to the defendant each month. The defendant testified that in the first winter (1900–1901) he learned of a bill for $120 that the plaintiff had not paid; that the next time he saw the plaintiff he told him what had happened, and that it must not happen again; that he must pay cash as he went, and that he could not have him running up bills for him, the defendant, to pay; that shortly after the time when he accepted the plaintiff's resignation, (which was in July, 1902,) he was at the farm and the plaintiff produced a grain bill from Manvel for $79.02, the last item on it being April 18, 1902; that the statements rendered by the plaintiff to him from time to time showed payments to Manvel for grain, and that he supposed that the items on the statements paid for all the grain bought, while in fact he kept back the bulk of the account. Then a week later he produced a bill for $180 for supplies bought before July; and in this connection also he had been putting in his monthly state-

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ments payments which the defendant supposed covered all expenses. Later, after the plaintiff had gone, he found another instance in a bill for hardware, amounting to $150.10.

Under these instructions the jury were allowed to find a verdict for the plaintiff although he had intentionally deceived the defendant as to the expenses incurred by him in running the farm.

W. H. Brooks, (*W. Hamilton* with him,) for the defendant.

A. C. Collins, for the plaintiff.

LORING, J. [After the foregoing statement of the case.] The defendant relies on the doctrine long established in this Commonwealth and last applied in *Homer* v. *Shaw*, 177 Mass. 1, where the earlier cases are collected, namely, that one who voluntarily has failed to complete a piece of work to be done under a special contract for an entire sum is without remedy.

The weight of authority is the same in other jurisdictions; *Forman & Co. Proprietary* v. *The Ship Liddesdale*, [1900] A. C. 190; *Hansbrough* v. *Peck*, 5 Wall. 497; *Scheible* v. *Klein*, 89 Mich. 376; *Kohn* v. *Fandel*, 29 Minn. 470; *Timberlake* v. *Thayer*, 71 Miss. 279; *Smith* v. *Brady*, 17 N. Y. 173; *Ginther* v. *Shultz*, 40 Ohio St. 104; *Posey* v. *Garth*, 7 Mo. 94; *Beach* v. *Mullin*, 5 Vroom, 343; *Hartman* v. *Meighan*, 171 Penn. St. 46; although there are decisions in some jurisdictions the other way, the leading case being *Britton* v. *Turner*, 6 N. H. 481.

But the doctrine of *Homer* v. *Shaw* does not necessarily reach the case at bar. For we assume that in *Homer* v. *Shaw* and the other cases *supra* the breach went to the essence of the contract, and that in the case at bar the failure to return accurate statements might have been held not to go to the essence of the contract. We also assume that a breach after part performance not going to the essence of the contract ordinarily will not prevent a recovery on the contract.

But we are of opinion that a wilful default in the performance of a stipulation not going to the essence of the contract bars a recovery. In this Commonwealth, where there is a remedy under some circumstances outside the contract in case a building is erected on the defendant's land, it is restricted "to cases in which there is an honest intention to go by the con-

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tract." *Hayward* v. *Leonard*, 7 Pick. 181, 187. To the same effect see *Hattin* v. *Chase*, 88 Maine, 237; *Kane* v. *Stone Co.* 39 Ohio St. 1; *Moore* v. *Carter*, 146 Penn. St. 492; *Barrett* v. *Coal Co.* 51 W. Va. 416.

In New York, where under somewhat similar circumstances there is a remedy on the contract, the right to recover is restricted in the same way "to cases of honest intention of contractors to fairly perform their contracts." *Crouch* v. *Gutmann*, 134 N. Y. 45, 55. See also *Heckmann* v. *Pinkney*, 81 N. Y. 211. To the same effect see *Leeds* v. *Little*, 42 Minn. 414; *Elliott* v. *Caldwell*, 43 Minn. 357; *Linch* v. *Paris Lumber & Grain Elevator Co.* 80 Tex. 23.

The ground on which it is held that a default after part performance not going to the essence of the contract does not bar a recovery on the contract is this: Where the parties have not in terms made the performance of the stipulation in question a condition precedent to the payment of the entire price named in the contract, the court is asked to hold that by implication it was the intention of the parties that a failure to perform this stipulation which does not go to the essence of the contract should defeat the plaintiff's right to the contract price. In such cases the court has held that by implication such cannot be taken to have been the intention of the parties, and has left the defendant to his cross action or other remedy for such a breach.

Where the plaintiff has honestly tried to perform his contract, it is one thing to hold that it must have been the intention to make the commission of such a breach a condition precedent. But where the default is wilful the question in our opinion is a different one. Where a contractor commits a wilful default and yet claims the contract price, he in effect claims that he has a right to break his contract. But he has no such right. "The doctrine that a breach after part performance is not a defence unless it goes to the essence, does not give a party a right to commit a breach because it does not go to the essence; it merely excuses the breach to the extent just stated after it has been committed." Langdell, Summary of the Law of Contracts, § 168.

In Metcalf on Contracts, pp. 7–9, the general doctrine is laid

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down that: "If the failure to perform the express contract be intentional, it is such bad faith that he can recover nothing." See also *Nelichka* v. *Esterly*, 29 Minn. 146.

For these reasons we are of opinion that the rulings were wrong; and the entry must be

Exceptions sustained.

NEW ENGLAND COTTON YARN COMPANY *vs.* LAUREL LAKE MILLS.

Bristol. October 25, 1905. — January 2, 1906.

Present: KNOWLTON, C. J., LATHROP, HAMMOND, LORING, & SHELDON, JJ.

Watercourse. Contract. Mills and Mill Owners.

In an action of tort by one manufacturing corporation against another, they being adjoining riparian owners on a natural watercourse and the plaintiff's mill being below that of the defendant, for withdrawing water from the stream and returning it below the plaintiff's mill instead of above it, so that the plaintiff was deprived of its use, the defendant showed that the plaintiff's grantor, by whose act the plaintiff was bound, by an agreement in writing granted to the defendant for a term of years still unexpired the right and privilege of running its condensing water into a cooling pond of the plaintiff below the plaintiff's mill and "to use said pond, dam and arrangements, as it now uses them, and has so used," and further showed that the use then and previously made by the defendant was to withdraw water from the stream for condensing purposes and instead of returning it into the stream so as to give the plaintiff the benefit of its flow, to discharge it by a different conduit into the plaintiff's cooling pond, where it could not be used by the plaintiff, and that this manner of using the water continued during the first ten years of the existence of the agreement. The agreement containing the grant to the plaintiff's grantor concluded with this clause: "By executing this instrument neither party waives any rights as riparian owners on said stream." *Held*, that the clause last quoted should be construed as if it read, that no riparian rights other than those granted by the preceding parts of the agreement were waived by either party, and consequently that the defendant, having established its right to do the acts complained of by the plaintiff, was entitled to judgment.

TORT, by a corporation organized under the laws of the State of New Jersey, maintaining a mill operated by steam at Fall River situated on a natural watercourse known as Cook Pond Outlet Stream, against a corporation organized under the laws of this Commonwealth, maintaining a mill and steam plant on

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the same stream adjoining and next above the land of the plaintiff, for the alleged wrongful diversion of large quantities of water from the stream and depriving the plaintiff of its use. Writ dated April 5, 1901.

The defendant's answer alleged that the acts complained of were done under and in compliance with the terms of an instrument in writing under seal executed by the plaintiff's grantor, the Globe Yarn Mills, and the defendant. This instrument is quoted in the opinion.

In the Superior Court the case was heard upon an agreed statement of facts by *Pierce*, J., who ordered judgment for the defendant. The plaintiff appealed.

The case was argued at the bar in October, 1905, before *Knowlton*, C. J., *Lathrop*, *Loring*, & *Sheldon*, JJ., and afterwards was submitted on briefs to all the justices except *Morton* & *Braley*, JJ.

O. Prescott, Jr., for the plaintiff.

L. E. Wood, for the defendant.

SHELDON, J. In May, 1889, and for some years before that time, the Globe Yarn Mills and the defendant, both manufacturing corporations, were adjoining riparian owners upon the same natural watercourse, the defendant being the upper owner. Both operated their plants by steam and were accustomed to draw water from the stream for condensing purposes. The Globe Yarn Mills had constructed upon its land a pond and other appliances, which it used to receive and cool the water from its condensing plant, and from which the cooled water returned to the natural stream. The water in this pond is at a lower level than the plant of the Globe Yarn Mills, and is not available for use therein and could not be made so without going to considerable expense to install and maintain a pumping system; it could be made available by this means. The defendant drew its condensing water from the stream at a point within its own land, and after using it discharged it by a pipe or conduit running through its own land into the land of the Globe Yarn Mills and thence into the pond of the latter corporation, where it became cooled and was discharged again into the natural stream, together with the water coming from the Globe Yarn Mills. All the water drawn from the stream by the de-

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fendant and used by it for condensing purposes thus became unavailable for use by the Globe Yarn Mills. Under these circumstances, on May 14, 1889, the Globe Yarn Mills and the defendant made the following agreement under seal:

"Whereas: The Globe Yarn Mills a corporation by law established, located and doing business at Fall River, County of Bristol and State of Massachusetts, has built a dam and pond on Cook Pond Outlet Stream, and made certain arrangements whereby the water is cooled after having been used for steam purposes, to the great benefit of said Mills and also of the Laurel Lake Mills, a corporation of said Fall River, now using the same for a like purpose.

"Said pond, dam and arrangements, being west of Mill No. 2 of the property of said Globe Yarn Mills, and wholly on land of said Globe Yarn Mills.

"And said Laurel Lake Mills desire to use the same for the purposes aforesaid.

"Now know all men to whom these presents may come, that the Globe Yarn Mills for itself, and its successors and assigns, in consideration of two hundred and fifty dollars to it paid by the said Laurel Lake Mills the receipt whereof is hereby acknowledged, and of the further sum of one hundred and twenty-five dollars to be paid October 1st, 1889, and of a like sum on October 1st of each and every year thereafter for the term of fifteen years from October 1st, 1888, does hereby grant to said Laurel Lake Mills, its successors and assigns, the right and privilege to run into said Pond its condensing water, and to use said Pond, dam and arrangements, as it now uses them, and has so used, since Oct. 1st, 1886. And the said Laurel Lake Mills for itself and its successors and assigns, does hereby agree to pay to said Globe Yarn Mills, its successors and assigns, said $250 on delivery of this instrument, and said $125 on October 1st, 1889, and $125 on October 1st of each and every year thereafter, for the term of fifteen years, from October 1st, 1888. The expense of keeping said dam, pond and arrangements, in the same repair they are now in shall be borne equally by the parties hereto. By executing this instrument neither party waives any rights as riparian owners on said stream."

In July, 1899, the plaintiff became the owner of the property

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of the Globe Yarn Mills, and has continued to own it ever since that time; and there is no dispute that this agreement is binding upon the plaintiff just as if it had been made between these parties themselves. Since then, as before, and up to the time of bringing this action, the defendant has run its condensing water into the pond, and has used the pond and its appliances as it was using them before and when the agreement was made, without waste, in the ordinary course of manufacturing. When the agreement was made, the water in the stream was generally, but not always, sufficient for both parties. Since then the natural flow of the stream has diminished, so that there is not sufficient water in the dry season for both parties, and the plaintiff has been obliged to buy water from the city of Fall River at considerable expense. The defendant has made all the payments provided for in the agreement, and has complied with all the terms thereof, unless it was under an obligation, if required by the plaintiff, after having withdrawn water from the stream and used it for condensing purposes, to return such water cooled into the stream before the stream enters the plaintiff's land. The payments made by the defendant to the Globe Yarn Mills and the plaintiff under the agreement have much exceeded in amount what it would have cost the defendant to install and operate a system for cooling its condensing water and returning it to the stream above the plaintiff's line, if the expense of procuring from some other source an amount of water equivalent to that so taken and discharged by it is included.

The plaintiff's complaint is that the defendant has withdrawn water from the stream for condensing purposes without returning this water cooled to the stream before it enters upon the plaintiff's land, whereby the amount of water available for use by the plaintiff has been diminished below its needs, to its serious damage; and the only question is whether, under the written agreement, the defendant has, as against the plaintiff, the right to do this.

No question is made, or can be made, that if there were no agreement the plaintiff, as a lower riparian owner, has a right to the natural flow of the stream from the defendant's premises into its own, and that the defendant has not the right to divert water from the stream for manufacturing purposes to such an

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extent as to deprive the plaintiff of the natural flow of the stream. *Newhall* v. *Ireson*, 8 Cush. 595. *Chandler* v. *Howland*, 7 Gray, 348. *Stowell* v. *Lincoln*, 11 Gray, 434. *Ware* v. *Allen*, 140 Mass. 513, 515. So, too, the plaintiff has the right to have the water come down in its natural condition, unheated and unpolluted. *Walker Ice Co.* v. *American Steel & Wire Co.* 185 Mass. 463. *Dwight Printing Co.* v. *Boston*, 122 Mass. 583. And this is the ground on which the plaintiff rests its contention. But the difficulty with its case is that by the agreement the Globe Yarn Mills, whose act is admitted to be binding on the plaintiff, has granted to the defendant "the right and privilege to run into said pond its condensing water, and to use said pond, dam and arrangements, as it now uses them, and has so used." The use then and previously made by the defendant was to withdraw water from the stream for condensing purposes, and then, instead of returning it cooled into the stream so as to give the plaintiff the benefit of its flow in the stream, to discharge it by a different conduit into the plaintiff's cooling pond, where it could not be used by the plaintiff, though fully available to any lower riparian owners. The right thus given to the defendant was not the right to withdraw water temporarily from the stream; for this right the defendant already had, subject only to the obligation to return such water to the stream properly cooled, without unreasonable detention and in substantially undiminished quantity. *Mannville Co.* v. *Worcester*, 138 Mass. 89, 91, 92. *Springfield* v. *Harris*, 4 Allen, 494, 496. *Thurber* v. *Martin*, 2 Gray, 394, 396. *Newhall* v. *Ireson*, 8 Cush. 595, 599. *Kensit* v. *Great Eastern Railway*, 27 Ch. D. 122. The right granted was, as expressly stated in the agreement, to discharge its water into the pond, at a level where it could not be used by the plaintiff, and to discharge in this way all the defendant's condensing water without restriction as to the source from which it was derived. Clearly this must be so unless the natural interpretation of the granting part of this agreement is altered by the clause, "By executing this instrument neither party waives any rights as riparian owners on said stream." But this clause must be construed in connection with the rest of the agreement. *Allen* v. *Holton*, 20 Pick. 458, 463. *Heywood* v. *Perrin*, 10 Pick. 228. *Ferguson* v. *Union Ins. Co.* 187 Mass. 8. In view

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of the fact that both parties at this time used only the water of the stream and that all the defendant's condensing water was then taken from the stream, it is manifest that at any rate some part of the lower proprietor's riparian rights was granted to the defendant. The agreement would have no effect if the defendant did not acquire by it the right to discharge its heated water into the cooling pond; and all this heated water then came, and apparently was expected to continue to come, from the stream. It seems to us therefore that this clause must be construed as if it read that no other riparian rights than those granted by the preceding parts of the agreement were waived by either party. And it appears from the agreed facts that this was the practical construction put upon the agreement by the original parties to it during the first ten years of its existence; for during the ten years that the Globe Yarn Mills owned the plaintiff's premises, although there was not always sufficient water for both parties, and although the defendant's conduct was continuously the same as now complained of, no such claim as that contended for by the plaintiff ever was made against the defendant. The gist of the plaintiff's complaint now is not that the defendant temporarily withdraws water from the stream, but that the defendant does not return such water directly to the stream so as to be available for the plaintiff's use, but instead thereof does just what the agreement says that it may do.

Accordingly, without invoking the principle that the language of this grant should be construed most strongly against the grantor, or the other principle, perhaps of less general application, that of two repugnant clauses in a deed the earlier should prevail, neither of which doctrines seems to us to be entitled to much weight in this case, but giving effect to all the language of this agreement, in the light of the then existing circumstances, we are of opinion that it gave to the defendant, as against the plaintiff, the right, instead of returning directly to the stream properly cooled the water which it had drawn therefrom for condensing purposes, to discharge such water into the plaintiff's cooling pond in the manner used when the agreement was made and ever since.

The result is that there must be

Judgment for the defendant.

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ROBERT A. GIFFORD *vs.* EDWARD B. JENNINGS.

Bristol. October 25, 1905. — January 2, 1906.

Present: KNOWLTON, C. J., LATHROP, LORING, BRALEY, & SHELDON, JJ.

Negligence, On highway. *Automobile*. *Words*, "Approaching."

An automobile coming up behind a vehicle on a public street is "approaching" it within the meaning of St. 1903, c. 473, § 7, requiring every person having control of an automobile upon any public street or way and approaching any vehicle drawn by a horse or horses to exercise every reasonable precaution to prevent the frightening of such horse or horses.

If one in control of an automobile on a public street comes up behind a market wagon, drawn at the rate of four miles an hour by a horse, not given to shying, kicking or running and not afraid of automobiles, and without sounding his horn comes within ten feet of the nearer hind wheel of the wagon and tries to pass where there is not room, he may be found to be negligent in not sounding his horn in conformity with the obligations imposed by St. 1903, c. 473, §§ 7, 10, and if the horse kicks and breaks his driver's leg, it may be found that this negligence was the cause of the injury.

TORT, for personal injuries alleged to have been caused by the negligence of the defendant in approaching and attempting to pass the plaintiff's wagon with his automobile without giving any warning of his approach, on the afternoon of September 1, 1903, on a country road in the town of Westport. Writ dated November 4, 1903.

At the trial in the Superior Court before *White*, J. the defendant at the close of the evidence asked the judge to order a verdict for the defendant, on the grounds that there was no evidence of the defendant's negligence and that on the evidence the plaintiff could not recover. The judge refused to rule as requested, and submitted the case to the jury. The jury returned a verdict for the plaintiff in the sum of $400; and the defendant alleged exceptions.

R. P. Borden & R. C. Davis, for the defendant.

A. G. Weeks, for the plaintiff.

LORING, J. The complaint made here is that through the defendant's negligence in driving his automobile the horse driven by the plaintiff kicked and broke the plaintiff's leg. The

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defendant came up from behind the plaintiff without blowing his horn. The judge ruled that the case was for the jury, and in our opinion that ruling was right.

The jury were warranted in finding that the horse was not given to shying, kicking or running; further that he was not frightened by automobiles, and that on the day of the accident three had passed him going in the same direction, without frightening him, and that each of the drivers of these three had sounded a horn; that the horse did not start until the automobile was within ten feet of the nigh hind wheel undertaking to pass the plaintiff where there was not room, and that the plaintiff had not heard it; that the plaintiff was driving at the rate of four miles an hour, in a market wagon with a load of fifteen hundred pounds, and had the reins "tight" "up good in" his hands.

The defendant and his witnesses told a different story.

St. 1903, c. 473, § 7, recognizing that an automobile is a novel machine, requires that the driver of one "approaching any vehicle drawn by a horse or horses," shall "operate, manage and control such automobile or motor cycle in such manner as to exercise every reasonable precaution to prevent the frightening of such horse or horses and to insure the safety and protection of any person riding or driving the same," and by § 10, that every automobile shall be provided "with a suitable bell, horn or other means of signalling."

We are of opinion that an automobile coming up behind a vehicle drawn by horses is "approaching" it within § 7 of this act. We are also of opinion that the jury were warranted in finding on the above facts that the defendant was negligent in not sounding his horn, and that that negligence was the cause of the breaking of the plaintiff's leg. The jury might find that a horn should be sounded on overtaking a horse not only to warn the driver of the horse to keep to his side of the road, but also to give timely warning of the approach of this machine which, in the kind of noise made by it, as well as in other respects, is novel and therefore may be dangerous, and that the defendant should have known this.

Exceptions overruled.

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JOHN LACK *vs.* HARGRAVES MILLS.

Bristol. October 25, 1905. — January 2, 1906.

Present: KNOWLTON, C. J., LATHROP, LORING, & SHELDON, JJ.

Negligence, Employer's liability.

In an action by an operator of a carding machine against his employer for alleged negligence in maintaining the machine in a defective condition, whereby pellets of hard, lumpy cotton were formed and thrown against the door of a cylinder so as to open the door when it should have been kept closed, thus allowing the plaintiff's hand to pass through it and be injured, if the defendant contends that by the operation of a principle of physics the pellets of cotton must have been thrown by centrifugal force downward, parallel to, past and not against the door, and the plaintiff introduces the evidence of experts who testify that in such a machine and under the circumstances shown the pellets would strike the door, and if also two witnesses testify that they have seen and heard pellets striking and opening the doors of such machines, the question of the defendant's negligence is for the jury.

TORT for personal injuries incurred while in the employ of the defendant. Writ dated April 26, 1904.

The following statement of the case is taken from the opinion of the court:

The plaintiff in this case was a card tender in the defendant's mills. Among other things it was his duty to take away the "waste" or refuse material which is separated from the cotton by carding it. This waste falls to the casing over the doffer from an opening at the end of the main carding cylinder and makes a pile which has to be removed at intervals while the card is running. It falls in the shape of a veil which hides a door in the cover of the main carding cylinder. This door ought to be shut except when the card is being ground or stripped. At the time of the accident it was open, but the fact that it was open was hidden by the veil of falling waste. The plaintiff supposing it to be shut put out his hand to remove the falling waste, his hand went through the open door and was caught by the revolving cylinder and injured. The defendant does not claim that the plaintiff was guilty of contributory negligence, nor that he had assumed the risk. Its only defence was that

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the door must have been left open by a fellow servant. The plaintiff introduced evidence tending to show that the door was shut at two o'clock by one Michael Rasimes, who helped the plaintiff strip the card at that time, and that it had not been touched afterwards down to the time of the accident, which was at ten minutes before four. His contention was that the card clothing on the cylinder had been crushed by a hoop of iron which ran through it some two months before the accident; that this had not been properly repaired, and that the result of its being used when not properly repaired was the formation of cylindrical pellets of hard, lumpy cotton, which were thrown against the door with such force as to throw it open. The door was as long as the width of the cylinder, six inches wide, and hinged on its lower edge. The defendant contended that it was physically impossible for the door to be opened in that way.

A short description of the carding machine becomes necessary. It was a revolving flat card manufactured by Hetherington and Sons. The cylinder in question here is the main cylinder. This is covered with "card clothing," which consists of wires about three eighths of an inch long set closely together in a covering fastened to the surface of the cylinder and bent at the ends. This cylinder makes one hundred and sixty-five revolutions a minute. Over the top of and across the cylinder are strips about an inch and a half wide, with similar wires bent at the ends but in the opposite direction. These strips are called flats. The ends of the wires on the flats are nine one thousandths of an inch from the ends of the wires on the cylinder, and their office is to pick the waste out of the cotton. These flats are fastened together on an endless chain, and revolve in the same direction as the cylinder, but at a much slower speed. They leave the cylinder, passing up and back at a point a little above the level of the axis of the cylinder. At this point there is a thin metal plate across the cylinder called the percentage plate. The upper edge of this percentage plate is fifteen one thousandths and the lower edge twenty-eight one thousandths of an inch distant from the ends of the wires on the cylinder, and the top of the door in question rests against this percentage plate. The door is distant from the cylinder about thirty-one one thousandths

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of an inch, and is practically parallel with the surface of the cylinder. Above this door is a brush which takes from the wires on the flats (as they turn to go back on the endless chain) the waste which they have taken up from the cotton, and this waste coheres as it falls and makes a sort of screen outside the door here in question. The cleaned cotton passes under the percentage plate behind the door to another smaller cylinder called the doffer, which takes the cotton from the main cylinder. The cotton is taken from the doffer by a comb. The cotton is then visible and looks like a veil or web. This web is collected in a sort of rope and coiled in cans and taken away.

There was evidence from the plaintiff that the door in question was "almost straight up, so that about five sheets of paper placed between the percentage plate and the door would make it upright." It was admitted that there were no fastenings on the door. The plaintiff's evidence was to the effect that the iron hoop which ran through the card bent down the wires and, although an attempt was made to straighten them, dirty, lumpy cotton passing over the furrow left by the iron formed into hard, cylindrical pellets which, when released after passing under the percentage plate, were thrown with a noise against the door, and by the concussion the door was thrown back beyond equilibrium and so fell open on to the top of the doffer casing.

Peters, the card grinder in charge of the card in question, testified that before the accident here in question, he had seen these doors open the fifth part of an inch nearly every week, and had seen three that were open so that they fell on the waste; and in answer to the question what would make the doors open, he said: "Sometimes when the cotton is lumpy and dirty it goes through and the licker-in takes too much of that cotton and throws it on the cylinder. The cylinder will carry it around once under the flat to the door and then it makes a noise [which he illustrated] and that can throw the door open"; and that at the time of the accident the defendant was using "dirty and lumpy cotton." He also testified that after the iron went through the card and it had been repaired, the card in question "did not work just the same; at the front and the end of the small doffer the cotton used to come out lumpy," lumpier than on the other cards. On cross-examination he said that he had seen a

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lump of cotton knock a door and open it part way, but never had seen it knocked wide open so that it fell.

Waldron, who had been a card grinder, had worked on cards twenty-four years, had been general secretary for the carders' union in New Bedford five years, and at the time of the trial was one of the trustees of the New Bedford Textile School, testified confirming the testimony of Peters as to the effect of jamming the wires. When the wires are bent back in this way it is called a jam. He then continued in these words: "A jam is very easily filled up on a card because the wires is all bent, filled up with cotton both good and bad, and if it is filled up a hard substance or a hard piece of cotton coming through the licker-in, striking that place, it cannot get down in the wire because the wire is already filled and it will go between, and it [making a noise], and in very many cases the door will go unless it is well fastened; that is, the door on the front of the cylinder will open and the door on a Hetherington card will fall down. I saw them many a time. They will do it when the wire is in bad condition on a card, filled up with cotton, because that is about half an inch deep, and the wire on the flats is the same, so that if it was not filled up there is almost an inch space beside the small spaces between where the hard substance could jam down," and that lumpy cotton will do this. On cross-examination he testified that "he once saw a lump of cotton make a door fly open; it was a hard lump. . . . The lump was probably an inch and a half or two inches and would taper down to 'what we termed a rat tail,' and probably would be as thick as your little finger." "He had seen half a dozen open that way in his experience, mostly on Hetherington cards."

Peters also testified that "at the time of the accident he was downstairs; he came up and found the plaintiff caught in the card between the doffer and cylinder; that the door of the cylinder was open, and there was under the door an amount of waste such as would require fifteen minutes running to accumulate."

At the trial the defendant called Rasimes, whose testimony was contradictory. But the jury were warranted from his testimony in finding that he confirmed the plaintiff's testimony that he, Rasimes, shut the door at two o'clock and left it closed. The defendant also called ten other witnesses, who contradicted

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almost every fact and every opinion testified to on behalf of the plaintiff.

The plaintiff went to the jury on his second count, which alleged that the accident was caused by the negligence of the defendant in suffering the card to be in a needlessly dangerous, defective and unsuitable condition. The defendant requested a ruling that on the whole evidence the plaintiff could not recover; that there was no evidence of the defendant's negligence, and that he could not recover under the second count. These rulings were refused, the plaintiff had a verdict, and the case is here on exceptions to the refusal to rule as requested.

R. P. Borden, (*R. C. Davis* with him,) for the defendant.

J. W. Cummings, (*E. Higginson & C. R. Cummings* with him,) for the plaintiff.

LORING, J. [After the foregoing statement of the case.] Without going into detail through the fifteen pages of the defendant's argument, which would be proper on a motion for a new trial since in substance it is to the effect that the plaintiff's story ought not to be believed, the only proposition of law which we have been able to extract from it is this: As matter of physical law, if such pellets of cotton could form and pass under the percentage plate they would be thrown by centrifugal force down parallel with the door and not against it. If the defendant is right as to the abstract principle of physics invoked by it, and if it is a matter of which the court will take judicial notice, we cannot say that as matter of law the plaintiff is wrong in the application made by his experts, who testified that by the law of centrifugal force, applied to the case of pellets pressed down on the wires which would spring up when released from the pressure of the flats and of the percentage plate, the pellets would strike the door, especially in view of the positive testimony of two witnesses that they in fact had seen and heard pellets work as the plaintiff here contended.

The other exceptions were not argued and we treat them as waived.

Exceptions overruled.

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PENNSYLVANIA IRON WORKS COMPANY *vs.* JUDSON C. MACKENZIE & others.

Bristol. October 25, 1905. — January 2, 1906.

Present: KNOWLTON, C. J., LATHROP, LORING, BRALEY, & SHELDON, JJ.

Corporation, Statutory liability of directors.

In an action by a creditor of a corporation to enforce the statutory liability of the directors of the corporation under R. L. c. 110, § 58, cl. 1, by reason of their making a dividend which it was alleged rendered the corporation insolvent, it appeared that the stockholders voted to authorize the directors to sell all the property of the corporation for $70,000, and that the directors thereafter voted to sell all the property of the corporation including bills and accounts receivable, to a person who held all the capital stock, for $70,000, and to pay that sum when received to the stockholders, reserving however a sufficient amount of bills and accounts receivable to pay all its debts, and authorized the president to carry out the vote, that the debts of the corporation amounted to $12,000, that the bills receivable retained by the corporation were of the face value of only $3,500, and that the $70,000 paid by the purchaser was immediately repaid to him as the only stockholder. *Held*, that the distribution of the proceeds of the sale of all the property of the corporation was a dividend within the meaning of the statute, and that the evidence justified a finding that the action of the defendants in declaring the dividend rendered the corporation insolvent; *also*, that the directors could not avoid their liability by authorizing the president to carry out their vote.

In an action by a creditor of a corporation to enforce the statutory liability of the directors of the corporation under R. L. c. 110, § 58, cl. 1, by reason of their making a dividend which it is alleged rendered the corporation insolvent, if it appears that the directors sold all the property of the corporation to a person who held all of its stock and paid the purchase money back to him as a dividend, the corporation retaining an amount of assets insufficient to pay its debts, evidence of a statement of the stockholder who purchased the corporate property, that he had in his hands sufficient property to pay all the indebtedness of the corporation including the debt to the plaintiff, even if it were not incompetent as hearsay, should be excluded as immaterial.

THE following statement of the case is taken from the opinion of the court:

This is a bill of complaint by a creditor of a Massachusetts corporation, the Hygeian Ice and Cold Storage Company, to charge the defendants personally, under R. L. c. 110, § 58, cl. 1, with the payment of the debt due to the plaintiff from that corporation, on the ground that they as directors of the corporation

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had made or consented to a dividend whereby the corporation was rendered insolvent.

On November 20, 1901, the stockholders voted to authorize the directors to sell all the property of the corporation for $70,000; and on December 9 following, the directors voted to sell all the property of the corporation, including bills and accounts receivable, to one Freeston, who at that time owned all the capital stock, for $70,000, "reserving, however, a sufficient amount of the said bills and accounts receivable to pay and liquidate all debts of the corporation; and that upon the payment of said sum of seventy thousand dollars, the same shall be paid to the stockholders," that is to say, to Freeston. The judge found that the debts of the corporation amounted to $12,000, and that bills receivable were retained by the corporation "of the admitted face value of about thirty-five hundred dollars"; that the $70,000 paid by Freeston was immediately repaid to him; and he found for the plaintiff.

The defendants asked for the following rulings:

"There is no evidence that the corporation was rendered insolvent by the action of the defendants in declaring a dividend.

"The action of the Hygeian Ice & Cold Storage Company of December 9, 1901, was not a declaration of a dividend within the meaning of the statute.

"The action of the directors of December 9, 1901, in carrying out the vote of the stockholders at a previous meeting was not a declaration of a dividend within the meaning of the statute.

"The vote of the directors, reserving a sufficient amount of property to pay all liabilities of the company, was not of a nature to render the corporation insolvent.

"It appears by all the evidence in the case that the corporation, if insolvent, was rendered insolvent by the wrongful act of some person other than the defendants and they are therefore not responsible.

"On all the evidence in the case the Hygeian Ice & Cold Storage Company cannot be declared insolvent.

"On all the evidence in the case the plaintiff cannot recover."

These were refused.

There was also an exception to the exclusion of the following evidence offered by the defendant: "The defendant then offered

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to prove by this witness that Mr. Freeston stated to him that he had sufficient property in his hands to pay all the indebtedness of the Hygeian Co., including the payment of the Lily evaporator, in event for their having to pay it at all."

The case is here on these exceptions.

D. F. Slade, for the defendants.

C. R. Cummings, (*J. W. Cummings* with him,) for the plaintiff.

LORING, J. [After the foregoing statement of the case.] 1. The evidence was ample that the corporation was rendered insolvent by the action of the defendants in declaring a dividend. The company had property which it sold for $70,000; it owed $12,000. It paid the whole $70,000 to its one stockholder, on his leaving with the corporation $3,500 in bills receivable. A distribution of the proceeds of a sale of all the property of the corporation is a dividend within R. L. c. 110, § 58, cl. 1. The object of that statutory provision is to secure to creditors their right to be paid out of the funds of the corporation, and its provisions apply even more to a final distribution of the proceeds of sale of the whole property than to a division of supposed earnings.

The defendants' contention is that the company was rendered insolvent by the act of the president in not retaining enough property to pay the debts, and not by the distribution of the $70,000. But the distribution among stockholders of the property of the corporation whether made out of profits or supposed profits while the corporation is going on or out of the proceeds of a realization of the property in winding up its concerns, must be made by directors and cannot be made by any one else. The statute here in question (R. L. c. 110, § 58, cl. 1,) makes them personally liable for a failure to perform that duty. It is a duty which cannot be delegated, or, to speak directly to the case before us, it is a duty for which they are liable if it is performed by a delegate. If the directors had voted to authorize the president to distribute so much of the $70,000 as he found was not needed to pay the debts of the corporation, they would not have performed the duty imposed upon them by this act. It is equally true that they could not do the same thing indirectly by voting to distribute all the purchase price of so much of the property as was left after the president had retained enough to

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pay the debts. Much evidence was gone into at the trial as to whether notes of $7,000 had been voluntarily retired by the president before the vote in question. The judge found that they had not, and we are of opinion that he was justified in so finding. But the issue was an immaterial one. If the notes had not been retired the debts were $5,000 and the assets retained were about $3,500. This disposes of the first, second, fourth and fifth rulings requested by the defendant.

2. The third request was rightly refused. The distribution of the purchase money originated with the directors. The stockholders' vote went no further than to fix the price in case the directors sold.

3. Without going through it in detail, the evidence warranted the findings, and the sixth and seventh rulings requested were rightly refused.

4. The statement of Freeston "that he had sufficient property in his hands to pay all the indebtedness of the Hygeian Co., including the payment" of the debt due the plaintiff, was immaterial apart from the fact that it was incompetent as hearsay.

What the plaintiff is complaining of here is that the property was in the hands of Freeston in place of being in the hands of the corporation to answer his debt.

Exceptions overruled.

ALEXANDER B. CLARK, trustee, *vs.* ALICE J. MULCAHY.

Essex. November 8, 1905. — January 2, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & BRALEY, JJ.

Bankruptcy. Evidence, Remoteness, Book entries.

In a suit in equity by a trustee in bankruptcy against the wife of the bankrupt to set aside a conveyance made to her by the bankrupt more than two years and a half before the adjudication in bankruptcy, the plaintiff offered to show what the bankrupt's financial condition was in the month of January of a certain year, for the purpose of showing what his intention was when he purchased the property and had it conveyed to his wife in the previous April, and also for the purpose of showing his financial condition at the time of the purchase, but he did not offer to show that the bankrupt's liabilities in the January in question were

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incurred in the previous April. The judge excluded the evidence as too remote. *Held*, that the exclusion of the evidence was a proper exercise of judicial discretion.

A ledger, incompetent because not a book of original entry, does not become competent because it has been mutilated by tearing out certain pages, especially where it is not shown that the original entries posted on those pages also have been mutilated, and where the fact of the mutilation is immaterial.

MORTON, J. This is a bill in equity brought by the trustee in bankruptcy of one Mulcahy against the wife of the bankrupt, to recover property which it is alleged the bankrupt voluntarily caused to be conveyed to her. Issues were submitted to a jury and were all answered in favor of the defendant. A decree was thereupon entered dismissing the bill with costs. The case is here on exceptions by the plaintiff to the exclusion of evidence offered by him in the course of the trial.

1. The conveyance which the plaintiff seeks to set aside was made May 16, 1896, pursuant to an agreement of sale dated April 24, 1896. Mulcahy was adjudicated a bankrupt January 3, 1899, more than two years and a half after the conveyance, and the plaintiff was appointed trustee on February 2, 1899. The plaintiff offered to show what the bankrupt's financial condition was on January 1, 1897, for the purpose of showing what his intention was when he purchased the property and had it conveyed to his wife in April, 1896, and also for the purpose of showing, as far as it might, his financial condition at the time of the purchase. In ruling upon the offer the presiding judge said, in substance, that he would allow the plaintiff to show what the bankrupt's liabilities were in January, 1897, if he could trace them back and show that they were incurred in the previous April. The plaintiff admitted, in effect, that his offer was not to show that, and did not allege that he could show that, and thereupon the presiding judge excluded the evidence as too remote, after again stating that he would allow the plaintiff to show, if he could, that the liabilities of the bankrupt as they existed in January, 1897, had accrued in the previous April, and after the plaintiff had repeated his offer in substantially the same terms as before. We think that the ruling was clearly right. What the bankrupt's financial condition was in January, 1897, did not necessarily tend to show what his condition must have been in the

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preceding April, or what his intent then was in buying the property and having it conveyed to his wife. The presiding judge properly excluded it in the exercise of his discretion as too remote. *Hosmer* v. *Oldham*, 122 Mass. 551. *Hackney* v. *Raymond Bros. Clarke Co.* 10 Am. Bankr. Rep. 213, 220. *Halbert* v. *Pranke*, 11 Am. Bankr. Rep. 620. The offer was made again later in the course of the trial, but was unaccompanied by anything which rendered the evidence any more admissible than before.

2. The fact that the ledger in use by the bankrupt in 1896 and closed in January, 1897, had been mutilated by tearing out the leaves containing the bankrupt's personal account, which was all that the plaintiff offered to show, did not render the ledger competent. The fact that the book had been mutilated threw no light upon any of the issues submitted to the jury, and was in itself immaterial. The book was rightly excluded.* So also was the evidence that was offered as to whether there was a cash surrender value to the life insurance policies carried by the bankrupt, and whether any money was paid to the trustee in bankruptcy under the policies. It was irrelevant and immaterial. The same is true of the schedule of creditors filed by the bankrupt on January 12, 1899, and of his indebtedness to A. B. Clark, the trustee in bankruptcy at that time.

3. The last exception relates to the exclusion of evidence relating to a lot of skins that had been sold to the bankrupt by Clark a few months before the bankruptcy. We are unable to see that it had anything to do with the issues on trial, and think it was rightly excluded.

The result is that the exceptions must be overruled.

So ordered.

F. G. Preston, for the plaintiff.

T. Parker, for the defendant, was not called upon.

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* The judge excluded the ledger on the ground that it was not a book of original entry. In answer to a question from the judge the counsel for the plaintiff stated that he did not propose to show that the original entries, which were posted in the ledger, had been mutilated.

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JOSEPH C. ABBOTT *vs.* SUPREME COLONY UNITED ORDER OF PILGRIM FATHERS & claimant.

Essex. November 9, 1905. — January 2, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & BRALEY, JJ.

Fraternal Beneficiary Corporation.

Where the certificate of a fraternal beneficiary corporation provides that "a change of beneficiary in any other manner than as directed by the constitution will not be legal or binding on the order," and a provision of the constitution, printed on the certificate, requires for such a change a declaration in writing signed by the member, witnessed by two reputable witnesses and acknowledged before a justice of the peace, or one of certain other officers named, an attempt of a member to change the beneficiary named in his certificate by signing at a hospital during his last illness a declaration on the form approved by the order and acknowledging it before a justice of the peace, but with no other witness, is of no effect, and it is immaterial that the justice of the peace tried to procure the necessary witnesses but failed to do so.

By the constitution of a fraternal beneficiary corporation a change of the beneficiary named in a certificate could be made only by a declaration in writing signed by the member, witnessed by two reputable witnesses and acknowledged before a justice of the peace, or one of certain other officers named. A member during his last illness signed such a declaration and acknowledged it before a notary public, but with no other witness. The declaration was forwarded to the subordinate lodge and was received by it a day or two before the death of the member. The constitution and laws of the order contained no provision authorizing a subordinate lodge or any of its officers to waive any requirement of the constitution and laws. The supreme board of directors knew nothing of the lack of witnesses to the declaration until after the death of the member. *Held*, that there was no evidence of a waiver of the requirement of two witnesses.

MORTON, J. The sole question in this case is whether there was a valid change of the beneficiary. The member at the time of his death, which occurred July 31, 1904, was in good standing and had been since March 28, 1900, when he was initiated as a member of a subordinate lodge, Suffolk Colony No. 21, on which date a benefit certificate was issued to him in the sum of $2,000, his wife being named as beneficiary. Subsequently his wife died, and on July 26, 1904, five days before his death at the Massachusetts General Hospital, he attempted to appoint his brother, the plaintiff, beneficiary in the place of his wife. The constitution and laws of the order provide as follows: "Each

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member of a Subordinate Colony shall cause to be entered on its Secretary's Rollbook a direction to whom the benefit shall be paid and his residence; but any member desiring to change his beneficiary shall give a written declaration thereof to the Secretary of the Colony signed by him and witnessed by two reputable witnesses and acknowledged before a Justice of the Peace, Notary Public, Judge or Clerk of a Court of Record or Master in Chancery, and the records shall then be changed to correspond with the declaration upon payment of one dollar," etc. This provision was printed in red ink on the certificate. There also appeared on the back of the certificate the following provision: "A change of beneficiary in any other manner than as directed by the constitution will not be legal or binding on the order." The deceased signed a written declaration of change of beneficiary in the form approved by the order and acknowledged it before a justice of the peace. Previous to signing he expressed a desire to the justice to make the plaintiff his sole beneficiary, and the justice thereupon tried to procure the necessary witnesses, but owing to a rule of the hospital which allowed but one visitor a day to a patient was unable to procure them. Subsequently at the request of the plaintiff but not in the presence of or with the knowledge of the deceased the justice signed the declaration as a witness, but no other witness signed it. The declaration was forwarded to the subordinate lodge and received by it a day or two before the death of the declarant. The constitution and laws of the order contain no provision allowing a subordinate lodge or any official thereof to waive any provision of the constitution and laws of the order, and there was undisputed evidence that the supreme board of directors knew nothing of the lack of witnesses to the declaration of a change of beneficiary till after Abbott's death.

The order admitted its liability and paid the fund into court, and after proper notice the administrator was made a party as claimant. The judge of the Superior Court found for the plaintiff, and the case is here on exceptions by the administrator to the refusal of the judge to rule, as requested, that the plaintiff could not recover, and that the fund was payable to the administrator.

We think that the rulings requested should have been given.

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It is well settled in this State that in cases like the present the benefit certificate cannot be transferred or a change made in the beneficiary, except in the manner provided in the constitution and laws of the order. *Clark* v. *Royal Arcanum*, 176 Mass. 468, 471. *McCarthy* v. *New England Order of Protection*, 153 Mass. 314, 320. *Daniels* v. *Pratt*, 143 Mass. 216. *Elsey* v. *Odd Fellows' Relief Assoc.* 142 Mass. 224. The fact that witnesses could not be procured for the reason stated did not render the attempted change effectual, and there is nothing to show any waiver of the provision requiring witnesses. The change which Abbott desired to make and the necessity for two witnesses does not appear to have been brought to the attention of the authorities of the hospital, and so far as appears no further effort was made during the few days that Abbott lived to render the change of beneficiary effectual, and to comply with the constitution and laws of the order. It cannot be doubted, we think, that the authorities would have permitted the parties to do what was necessary to render the change effectual, if the matter had been called to their attention.

Exceptions sustained.

J. A. Brackett, for the claimant, was stopped by the court.

A. F. King, Jr., for the plaintiff.

EZRA L. BROWNE, administrator, *vs.* HENRY M. BIXBY & another, executors.

Essex. November 9, 1905. — January 2, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & BRALEY, JJ.

Husband and Wife. Surety. Equity Pleading and Practice.

The administrator with the will annexed of the estate of a married woman may maintain a bill in equity against the executor under the will of her husband, to compel him to pay from the estate of the husband a note given by the husband and wife jointly for a debt of the husband and secured by a mortgage on real estate of the wife, so as to relieve the estate of the wife from liability.

The administrator with the will annexed of the estate of a wife is a proper party

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to maintain a bill in equity against the legal representative of her husband, to compel the defendant to pay a note given by the husband and wife jointly for a debt of the husband and secured by a mortgage on real estate of the wife.

KNOWLTON, C. J. This is a bill in equity, brought by the administrator with the will annexed of a married woman, against the executors of the will of her husband. It comes to this court on an appeal of the plaintiff from a decree sustaining the defendants' demurrer and dismissing the bill. The case presented by the averments of the bill shows a joint note of the husband and wife, given for a loan of $8,000 made to the husband by the Georgetown Savings Bank, with a mortgage upon the wife's real estate, given as security for the note. The husband was the principal, and the wife was a surety, who signed her name and conveyed her separate property for his benefit, as security for his debt. Her legal representative now seeks to compel his representatives to exonerate her property and relieve her estate from liability by paying the note. The principal ground of the demurrer is that the transaction was a contract between husband and wife, which neither a court of law nor a court of equity will enforce.

The foundation of the suit is not a contract made by the husband with his wife, but the application of a familiar law of suretyship, which gives a surety a right, as between him and his principal, to be reimbursed for his payments and relieved from liability for outstanding debts by the principal who is primarily liable for them. The relation of husband and wife, existing between the principal and the surety, does not prevent the enforcement of this general rule. In *Minot, petitioner*, 164 Mass. 38, 41, the law is stated by Mr. Justice Allen as follows: "When a husband and wife join in a mortgage of her land to secure a debt of the husband, her estate is considered only as a security for the debt, for which the husband and his estate are primarily liable; and the wife or her heir, after the death of the husband, will be entitled to have it exonerated out of the estate of the husband." In *Savage* v. *Winchester*, 15 Gray, 453, 455, the subject is fully discussed by Mr. Justice Hoar, with a citation of the authorities, and the rule is stated broadly in similar language. In *Robinson* v. *Gee*, 1 Ves. Sr. 251, 252, Lord Hardwicke said, "It is a common case for a wife to join in a

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mortgage of her inheritance for a debt of her husband; after the husband's death she is entitled to have her real estate exonerated out of the personal and real assets of the husband; the court considering her estate only as a surety for his debt." This dictum has become generally recognized law, both in England and America. *Aguilar* v. *Aguilar*, 5 Madd. 414. *Hudson* v. *Carmichael*, Kay, 613. *Neimcewicz* v. *Gahn*, 3 Paige, 614. *Wilcox* v. *Todd*, 64 Mo. 388. *Shea* v. *McMahon*, 16 App. D. C. 65. *Johns* v. *Reardon*, 11 Md. 465. *Bull* v. *Coe*, 77 Cal. 54. *Hubbard* v. *Ogden*, 22 Kans. 368. *Shinn* v. *Smith*, 79 N. C. 310.

The defendants contend that, if an action of this kind can be maintained, it should be brought by heirs or devisees, and not by the administrator with the will annexed. It does not appear what disposition of the real estate is made by the will in this case; but even if the plaintiff is not called upon to administer it directly, we are of opinion that he has an interest to have it exonerated, sufficient to enable him to maintain the suit. Whether it goes to devisees under the will, or to heirs as undevised property, if the mortgage is enforced against it, the devisee or heir will be entitled to resort to the administrator to have the debt paid out of the personal assets, to the exemption of the real estate. In this way the plaintiff is interested to have the mortgage discharged, so that the personal estate of the testatrix may not be held upon her note, or upon a claim of the heir or devisee, if the real estate is taken under the mortgage.

Decree reversed; demurrer overruled.

R. M. Mahoney, for the plaintiff.

W. D. Chapple, for the defendants.

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BEACON FALLS RUBBER SHOE COMPANY *vs.* PHILIP PRATTE.

Bristol. October 23, 1905. — January 3, 1906.

Present: KNOWLTON, C. J., LATHROP, LORING, BRALEY, & SHELDON, JJ.

Sale, Rescission. *Replevin*, Of goods alleged to have been procured by false and fraudulent representations to a mercantile agency. *Practice, Civil*, Agreed statement of facts.

In an action of replevin for goods sold by the plaintiff to the defendant on a credit alleged to have been procured by false and fraudulent representations made by the defendant to a mercantile agency, it appeared that the defendant made a false statement of his condition to the agency, stating surplus assets of $4,900, which a year and a half later the agency at the request of the plaintiff sent to him with the following comment: "Figures cannot be fully corroborated and are generally believed liberal. Carries a small bank balance, asks no accommodation and is reported as meeting obligations promptly. An estimate of about $1,000 for net worth is called conservative." It was agreed that "the plaintiff's credit man would, if competent, testify that he relied upon the statements in extending the credit asked for, but whether he did so rely or rely solely thereon is to be determined by the court from all the facts." The judge to whom the case was submitted on an agreed statement of facts, with power to draw inferences, found against the plaintiff. *Held*, that this finding could be justified either on the ground that the credit man did not rely on the statement, or that he had no right to rely upon it because made so long before the plaintiff sold the goods; and *semble* that the comment made by the agency was enough to put the plaintiff on his guard.

LATHROP, J. This is an action of replevin of certain goods, sold by the plaintiff to the defendant in June, 1903, and in the fall of that year. The case was submitted to the Superior Court on an agreed statement of facts, with power to draw inferences. The judge found for the defendant, with an order for the return of the goods, and we assume for the purposes of the case that a judgment was entered accordingly, though this does not fully appear. The case is before us on the plaintiff's appeal.

The plaintiff seeks to maintain the action on the ground that it sold the goods relying upon false and fraudulent representations made by the defendant to Dun's Mercantile Agency and communicated to the plaintiff.

It appears from the agreed statement of facts that the defendant in December, 1901, made a false statement of his condition to the agency, stating surplus assets of $4,900, and that on

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June 11, 1903, the agency sent to the plaintiff at its request a copy of this statement with the following comment thereon: "Figures cannot be fully corroborated and are generally believed liberal. Carries a small bank balance, asks no accommodation and is reported as meeting obligations promptly. An estimate of about $1,000 for net worth is called conservative."

It was agreed that "The plaintiff's credit man would, if competent, testify that he relied upon the statements in extending the credit asked for, but whether he did so rely or rely solely thereon is to be determined by the court from all the facts." Here was a fact to be determined by the judge of the court below. It was a necessary part of the plaintiff's case to show that the plaintiff's agent relied upon these representations.

The judge has found against the plaintiff, and this finding may be justified either on the ground that the credit man did not rely upon the statement, or that he had no right to rely upon it, for the reason that the statement was made so long before the sales by the plaintiff. *Macullar* v. *McKinley*, 99 N. Y. 353, 358. Moreover the comment made by the agency was enough to put the plaintiff on its guard.

Judgment for the defendant.

C. P. Ryan, for the plaintiff.

A. S. Phillips, for the defendant.

ERNEST BOTTOMLEY *vs.* ROYAL INSURANCE COMPANY.

Essex. November 8, 1905. — January 3, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & BRALEY, JJ.

Insurance, Against leakage of sprinkler. *Contract*, Construction.

A manufacturer occupying the second floor only of a five story building equipped throughout with the Grinnell automatic sprinkling system sued on a policy insuring him "against all direct loss or damage caused by water discharged, or that may leak from the automatic sprinkler system known as the Grinnell, now erected in or on that portion of the building occupied by the assured, described as follows: brick building situate in extreme rear of No. 2-20 Washington Street, Haverhill." It appeared that the damage for which the plaintiff sought to recover was caused by water from a broken sprinkler on the fifth floor of the

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building, which was occupied by another manufacturer. *Held*, that the plaintiff could not recover, as the policy should be construed to insure only against damage from leakage of the sprinkler erected on the portion of the building occupied by the plaintiff.

MORTON, J. The plaintiff is a shoe manufacturer, and was occupying in April, 1902, the second floor of a building in Haverhill. The building contained five stories and a basement and was equipped throughout with the Grinnell automatic sprinkler system. He was insured in the defendant company under a policy entitled "Sprinkler Leakage Contract . . . against all direct loss or damage caused by water discharged, or that may leak from the automatic sprinkler system known as the Grinnell, now erected in or on that portion of the building occupied by the assured, described as follows: brick building situate in extreme rear of No. 2–20 Washington Street, Haverhill." On April 2, 1902, a portion of the plaintiff's premises was flooded with water from a broken sprinkler on the fifth floor of the building occupied by one Kimball as a shoe factory. The water found its way through the floor in large quantities down through intervening stories into the premises occupied by the plaintiff and damaged his property upwards of $700 as found by the auditor. This is an action upon the policy to recover the loss thus sustained. The case was submitted to a judge of the Superior Court upon the auditor's report and exhibits as an agreed statement of facts, so far as competent and material, with power to draw inferences. The judge found for the defendant, and the plaintiff appealed.

Assuming, in favor of the plaintiff, that the question of the construction of the policy is open to him on the record, and that the provision in the policy requiring a submission to arbitration was waived by the defendant, we are of opinion that the loss does not come within the terms of the policy. What the plaintiff was insured against was "direct loss or damage caused by water discharged, or that may leak from the automatic sprinkler . . . now erected in or on that portion of the building occupied by the assured, described," etc. The description related to the location of the building, and the loss that the plaintiff was insured against was the loss arising from the leakage or discharge occurring in the sprinkler on his own premises. The reference to

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the sprinkler as the "system known as the Grinnell" was simply to identify the kind of sprinkler used. But, as we construe the policy, the risk insured against was particularly confined to discharges or leakages from the sprinkler erected in or on that portion of the building occupied by the plaintiff.

We think that the judgment for the defendant should be affirmed.

So ordered.

W. S. Peters & H. J. Cole, for the plaintiff.

F. W. Brown, for the defendant.

JAMES J. COOPER *vs.* MICHAEL CASHMAN & another.

Essex. November 8, 1905. — January 3, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & BRALEY, JJ.

Negligence. Animal.

In an action by a teamster against a contractor employing him, for injuries from the kick of a horse alleged to be vicious, it appeared that the plaintiff was fifty-one years of age and had worked in stables from the age of eighteen or twenty years, that the horse which kicked him was one of a large number which the defendant brought at one time to his stable from Canada or the West, that the plaintiff was the only person who drove this horse from the time he arrived until the time of the accident, about two months later, and that during that time the plaintiff groomed, harnessed and unharnessed the horse, taking up his hind feet and cleaning them, and sometimes fed him, that he never saw the horse do anything that he would call vicious, and that he liked him and had told the defendant that he was a good, clever horse, that the only previous misbehavior on the part of the horse while in the possession of the defendant was that on the day of his arrival, when there was a crowd of spectators about him, he kicked a man, not a horseman, who went into his stall carrying a pail, that this incident was a matter of common knowledge about the stable, and that thereafter the horse never was known to kick anybody until the time of the accident. The plaintiff testified that he did not know of the previous kicking, but there was no evidence that the defendant believed or had reason to believe that the plaintiff was ignorant of what had happened. *Held*, that the failure of the defendant to tell the plaintiff of the previous kicking was not evidence of negligence on the part of the defendant.

In an action by a teamster against a contractor employing him, for injuries from the kick of a horse, which the plaintiff drove, harnessed, groomed and sometimes fed during the two months that he had been in the defendant's possession, there was evidence that, a short time before the accident, a veterinary surgeon was

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asked by the defendant "if he knew any reason why the horse should be poor, and not take fat and look a little better," and that, after looking him over, he inquired whether he was a nervous horse and was answered in the negative, after which he said, "I should call him a nervous, vicious horse." He further gave his opinion that the horse had no special ailment. *Held*, that there was nothing in this testimony having any tendency to show that the horse was likely to kick, or that it was the duty of the defendant to tell the plaintiff that the horse was dangerous.

TORT by a teamster, against the members of a firm of contractors employing him, for injuries from the kick of a horse of the defendant alleged to be vicious. Writ dated January 17, 1903.

In the Superior Court the case was tried before *Mason*, C. J., who at the close of the plaintiff's evidence ruled that the plaintiff was not entitled to recover, and ordered a verdict for the defendants. The plaintiff alleged exceptions.

H. J. Edwards, (*R. E. Harding* with him,) for the plaintiff.

C. M. Pratt, for the defendants.

KNOWLTON, C. J. The question in this case is whether there was evidence of negligence on the part of the defendants, which made them liable to the plaintiff for the kick of a horse by which he was injured.

If one knowingly keeps a vicious or dangerous animal which is accustomed to attack and injure mankind, he is *prima facie* liable for injuries done by it, without proof of negligence as to the manner of keeping it. The negligence on which the liability is founded is keeping such an animal with knowledge of its propensities. *Popplewell* v. *Pierce*, 10 Cush. 509.

There was no evidence tending to show that the defendants' horse was an animal of the kind to which this rule of law applies, and the declaration does not contain averments founded on the rule. In his declaration the plaintiff says in substance that he was a teamster, that it was a part of his duty to take care of horses which he drove for the defendants, and that one of these horses kicked him as he was entering its stall, in the exercise of due care, and that the defendants, "well knowing the vicious and treacherous nature of said horse, were grossly careless and negligent in not informing said plaintiff of the vicious and treacherous nature of said horse." The gist of the action is the alleged negligence of the defendants in

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failing to give the plaintiff information and warning necessary for his protection.

The plaintiff, a man fifty-one years of age, had worked in stables, according to his own testimony, all his life. Expressing the same thing in another way, he said he began at the age of eighteen or twenty years. No one could know better than he the risk of injury in the care of horses, and how to avoid it. The horse that injured him was one of a large number which the defendants brought to their stable from Canada or the West, at one time, in March, 1902. The defendants at that time knew nothing particularly about the habits or peculiarities of any of them, except that which the plaintiff could judge by observation as well as they could. Everybody knows that there is some risk, and that care is necessary, in feeding and grooming and managing such a lot of strange horses.

The evidence tended to show that the plaintiff was the only person who drove this horse after the defendants got him, up to the time of the accident on May 26, and that he used him with another in a team during most of that period, grooming him, harnessing and unharnessing him, taking up his hind feet and cleaning them, and sometimes feeding him. He testified that he never saw the horse do anything that he would call vicious, and that he told one of the defendants before the accident that he was a good, clever horse, a good work horse. He also said that he liked the horse, that he was fond of him, and named him after a young fellow in the house.

The only evidence that the horse ever did anything unkind was, that on the day of his arrival at the defendants' stable, when there was a crowd of spectators about him, one Martin, who testified that he was a coal hoister and engineer, and did not claim to be a horseman, went into the stall carrying a pail, and the horse kicked, hitting at the same time the man and the pail. Except at that time, he never was known to kick at anybody before the time of the plaintiff's injury. According to the evidence, this kicking of Martin was a matter of common knowledge about the stable, and the plaintiff testified that if a man was kicked in the stable, it was common talk, and he would be likely to know it. Upon the undisputed testimony of the plaintiff himself, the defendants had no reason to suppose that

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he was ignorant of this incident of kicking in the stable where the plaintiff was employed, which was seen by many persons. Unless they had reason to suppose that he was ignorant of it, and needed warning of danger from this particular horse as distinguished from other strange horses, they cannot be charged with negligence. We see no evidence that they believed or had reason to believe that the plaintiff was ignorant of what had happened.

If the plaintiff, as he testifies, did not know of this single instance of kicking, it does not appear that his conduct at the time of the injury was affected by this ignorance. Previously to that he had used and taken care of the horse for a long time, and had formed his judgment in regard to him from observation and experience. It is not to be supposed that his management of the horse at the time of the accident would have been affected by information that, many weeks before, when the horse had just been brought in from a long car trip, and was perhaps excited by a crowd of spectators around him, he kicked a stranger, not a horseman, who entered his stall with a pail. Much less did the defendants have reason to believe that a man of the plaintiff's experience, who seemingly knew a great deal more about this horse than either of them or any other of their servants, would need to be told of the possibility that he might kick. The case is very similar in its facts to *Eastman* v. *Scott*, 182 Mass. 192, in which it was held that knowledge by the owner of a horse, that he previously had kicked a man in the stable was not enough to charge him with negligence for failing to tell the plaintiff, who was afterwards kicked by him while he was using him in the defendants' service.

The evidence of the conduct of the horse on one occasion, when he got loose in the large stable, had no tendency to show that he was different from other horses, or that there was special danger in taking care of him or using him.

There was testimony that a veterinary surgeon was asked by the owner "if he knew any reason why the horse should be poor, and not take fat and look a little better," and that, after looking him over, he inquired if he was a nervous horse and was answered in the negative, after which he said, "I should call him a nervous, vicious horse." He was asked further whether

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the horse had a special ailment, and gave his opinion that he had not. There is nothing in this testimony that has any tendency to show that the horse was likely to kick, or that it was the duty of the defendants to tell the plaintiff that he was dangerous. The surgeon was examining the horse in reference to his health. He did not profess to be able to tell even whether he was nervous or not, but asked the owner about it for information. A jury would not be warranted in finding that this remark, made apparently only a short time before the plaintiff's injury, imposed upon the defendants the duty of warning a man like the plaintiff that the horse which he was using had a propensity for kicking.

We are of opinion that the ruling of the Superior Court was correct.

Exceptions overruled.

JOSEPHINE SLATTERY *vs.* LAWRENCE ICE COMPANY.

Essex. November 9, 1905. — January 3, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & BRALEY, JJ.

Negligence.

A girl six years and eight months of age living with her father and her grandmother can be allowed to leave the house and go upon a highway unattended without negligence being imputed as matter of law to her father or her grandmother if she is injured.

A girl six years and eight months of age engaged in play upon a highway, although not a traveller entitled to recover under the highway act for an injury from a defect in the street, can maintain an action against a person by whose negligence she is injured while in the exercise of the degree of care reasonably to be expected from her.

A girl six years and eight months of age sitting on the curbstone of a sidewalk, who, when told by an ice man carrying a piece of ice on his shoulder to get out of the way, gets up, moves out of the way, and sits down again farther along on the curbstone, if injured by the ice falling and striking her leg when the ice man stumbles, can be found to be in the exercise of the degree of care reasonably to be expected from her, and even in the exercise of the degree of care to be expected from a reasonably careful adult.

If the employee of an ice company carries a one hundred pound piece of ice on his shoulder without tongs in a street where many children are near, and, slipping as he approaches the curbstone of a sidewalk, gives the cake of ice a twitch or

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jerk so that it falls and strikes the sidewalk bounding up and breaking the leg of a child who in the exercise of due care has moved to make room for the ice man to pass, there is evidence of the employee's negligence, and the ice company may be found to be liable for the injury to the child, as the resulting accident although unusual and peculiar is not so extraordinary that it might not reasonably have been foreseen and guarded against by those in charge of the ice company's business.

TORT, by a girl six years and eight months of age when injured, against an ice company, for injuries alleged to have been caused by the negligence of the defendant's servant in so carelessly handling a cake of ice that it fell upon the plaintiff and broke her leg. Writ dated March 10, 1903.

At the trial in the Superior Court before *Fox*, J. it appeared that the plaintiff lived with her father and her grandmother on Elm Street, in the city of Lawrence; that on August 2, 1902, after twelve o'clock dinner, the plaintiff went out to the street and remained there, playing with other children, until she was hurt. She testified that, while she and a little girl of about her own age were playing on the sidewalk, she saw the ice team come down the street with a lot of children following it; that it drove on past her and stopped in the middle of the street opposite a store which was on the north side of the street; that at that time she and the other little girl were sitting on the curbstone on the south side of the street; that she asked the girl's brother to go to the team for a piece of ice; that, while he had gone after the ice and while she was sitting on the curbstone, one of the men in the employ of the defendant, who was with the team, hoisted a piece of ice in the tongs from the cart to his back, and came across the street toward where she was sitting; that as he came along he told her to get out of the way, and she got up, moved out of the way, and sat down again; that just as he stepped up upon the curbstone he gave the cake of ice a twitch or jerk and it fell, striking her leg and then her foot, as she sat on the curbstone. She further testified that she was six years and eight months old at the time of the accident, and had been at school for a year; that the accident happened between three and four o'clock in the afternoon, and that up to that time she had been playing on the sidewalk, but not in the roadway at all, and that she did not see her grandmother or her father from dinner until the accident.

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The father of the plaintiff testified that the accident happened between four and five o'clock in the afternoon, and that he had left the house after dinner about one o'clock, and had not seen his child again until after she was hurt. He further testified that he spent part of the afternoon in a store on the same street about a block from his house near which the girl was injured, that he knew there were ice wagons and other teams on the street, and that he could have kept track of his daughter's whereabouts.

The grandmother died shortly after the accident, and there was no testimony offered with reference to where she was during the afternoon of this day.

One Hall, called by the defendant, testified that in August, 1902, he was working for the defendant, and had then been employed by the defendant for about nine years; that on the day of the accident he was standing on the platform of the wagon, and had cut a cake of ice in two, and lifted it to the shoulders of one Sullivan, who was to carry it into a store; that there were four or five children about the rear of the cart at the time, and the witness told them to get out of the way; that when he placed the cake of ice on Sullivan's shoulder, Sullivan stepped on some one's foot, and in attempting to recover his balance he let the cake of ice fall; that it struck the ground, and then bounded up and struck the plaintiff; that when ice had to be put into boxes with an opening five or six feet from the floor, the safest and most convenient method of carrying it was on the shoulder, and tongs would not be employed.

Sullivan testified that he was employed by the defendant at the time of the accident and had been for about fourteen years; that he was delivering ice in a store on Elm Street, where the opening in the ice box was about six feet from the floor, and was carrying it in, one hundred pounds at a time; that Hall had cut the cake on the wagon and lifted it with the tongs to the witness's shoulder; that there were several children about, and he and Hall both told them to get out of the way; that he took the cake of ice on his left shoulder, with his left hand on top of it and his right hand underneath it, and as he did so he stepped on one of the children, and when the child cried he stepped back and lost his balance; that the ice fell

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and struck the ground, and then bounded up and struck the plaintiff.

One Holt testified that he was the manager of the defendant company, and had been engaged in the ice business for seventeen years; that he was familiar with the method of carrying ice into houses and stores, and that for a man to carry ice on his shoulder, where the ice box opening was high, was the proper, safe and usual method.

At the close of the evidence, the defendant asked the judge to make the following rulings: 1. There is no evidence of negligence on the part of the defendant or its employees, and the plaintiff is not entitled to recover. 2. Upon all the evidence the plaintiff was not in the exercise of due care at the time she was injured. 3. The father of the plaintiff was not in the exercise of due care in allowing her to remain on the street unattended for the length of time that she was there, and his lack of due care is attributable to the plaintiff, and she cannot recover. 4. The grandmother of the plaintiff was negligent in allowing her to remain on the street unattended for the time that she was there, and her negligence is attributable to the plaintiff, and she cannot recover.

The judge refused to make the rulings requested, and instructed the jury among other things that if the plaintiff was out in the street behind the ice cart and heard the command to get out of the way, and stayed there and got hurt, as was testified to by the defendant's witnesses, then she was not in the exercise of due care, and could not recover. The jury returned a verdict for the plaintiff in the sum of $400; and the defendant alleged exceptions.

W. S. Knox, for the defendant.

L. S. Cox, for the plaintiff, was not called upon.

BRALEY, J. The plaintiff although a child of tender years had reached an age when she could be allowed to leave her home and go upon the public ways without negligence being conclusively imputed to her father or grandmother with whom she lived. *McDermott* v. *Boston Elevated Railway*, 184 Mass. 126, 128, and cases there cited. *Young* v. *Small*, 188 Mass. 4.

And the fact that with her companions she was engaged in play does not bar a recovery, however decisive such a circum-

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stance might be in a suit against the municipality for injuries received by a defect in the street. *O'Brien* v. *Hudner*, 182 Mass. 381. *Tighe* v. *Lowell*, 119 Mass. 472.

Upon conflicting evidence there were two possible conclusions that could have been reached as to her conduct. If the defendant's witnesses were believed, at the time of her injury she with other children was at the rear of the ice cart where they carelessly remained after being ordered to leave. But this defence evidently was not accepted by the jury to whom the question was properly left, with the specific instruction that if they found this version to be true, the plaintiff was negligent and could not recover.

It often has been said by this court that the standard of care on the part of an infant plaintiff, if found capable of going on the public ways unattended, depends upon his age and intelligence. *Aiken* v. *Holyoke Street Railway*, 180 Mass. 8. *McDermott* v. *Boston Elevated Railway*, *ubi supra*.

Under proper instructions, it was therefore for the jury to determine by this test the character of the plaintiff's behavior. But upon her statement of the manner in which the accident happened she also could have been found to have exercised the degree of care required of a reasonably careful adult. *Wiswell* v. *Doyle*, 160 Mass. 42. *McNeil* v. *Boston Ice Co.* 173 Mass. 570.

By either standard to take a seat farther along on the curbstone in obedience to an order of the defendant's servant, and for the purpose of leaving room for him to pass from the carriage way to the sidewalk was not of itself an act of negligence.

The jury could find, as undoubtedly they did, that there was no apparent reason for her to anticipate that the defendant's servant would twist the cake of ice he was carrying on his shoulder so that it would fall and finally come in contact with her person, and for this reason the second, third and fourth rulings requested were rightly refused.

While the combination of circumstances which caused him to stumble, and the cake of ice to fall on the ground, when it rebounded striking her, are unusual and peculiar, they cannot be said as matter of law to be so extraordinary as not reasonably to have been foreseen, and hence should have been guarded against

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by those in charge of the defendant's business. *Powell* v. *Deveney*, 3 Cush. 300. *Manning* v. *West End Street Railway*, 166 Mass. 230, 231. *Flynn* v. *Butler*, 189 Mass. 377. The first ruling consequently could not have been properly given.

Exceptions overruled.

FRANK G. HALE, administrator, *vs.* NEW YORK, NEW HAVEN, AND HARTFORD RAILROAD COMPANY.

Essex. November 10, 1905. — January 3, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & BRALEY, JJ.

Negligence. Railroad.

In an action against a railroad company under R. L. c. 111, § 267, for causing the death of the plaintiff's intestate, not a passenger or in the employ of the defendant, by reason of its negligence or the gross negligence of its servants, it appeared that the plaintiff's intestate while engaged with others in loading a heavy block of granite upon a freight car standing on a steep grade in a quarry was fatally injured by the starting of the car down the grade which caused the block to fall upon and crush him, that the starting of the car was due to a defective brake, that the grade on which the car stood was not so steep but that a brake in proper condition could have controlled the car, and that the ordinary course of business between the defendant and the quarry company was for the defendant to furnish cars at or near the place of loading on the quarry company's tracks and take them away when loaded. *Held*, that there was evidence for the jury that the defendant was negligent in providing an unsafe car for the use of the plaintiff and his fellow workmen, and evidence that the accident was caused by the gross negligence of the defendant's servants or agents in permitting the defective car to be used; *also*, that if there was negligence on the part of the workmen of the quarry company in failing to block the wheels of the defective car with pieces of wood, as an additional precaution, this did not relieve the defendant from liability.

TORT, by the administrator of the estate of Nicademas Arenues, an employee of the receivers of the Quincy Granite Quarries Company, with a count at common law for conscious suffering of the plaintiff's intestate, and two counts under R. L. c. 111, § 267, for causing the death of the plaintiff's intestate, not a passenger or in the employ of the defendant, by reason of the negligence of the defendant or the gross negligence of its servants or agents while engaged in its business. Writ dated September 2, 1904.

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At the trial in the Superior Court *Lawton*, J. at the close of the plaintiff's evidence ordered a verdict for the defendant, and reported the case for determination by this court, with an agreement of the parties that, if upon the evidence the case should have been left to the jury, judgment was to be entered for the plaintiff in the sum of $3,000; otherwise, judgment was to be entered for the defendant.

W. A. Pew, Jr., for the plaintiff.

J. L. Hall, for the defendant.

KNOWLTON, C. J. The plaintiff's intestate, while engaged with others in loading a heavy block of granite upon a freight car standing on a steep grade in a quarry, was fatally injured by the starting of the car and its running down the grade, thus causing the block to fall upon him and crush him. The evidence tends to show that the brake of the car was badly worn and out of repair, so that the brake shoe was off the wheel directly under the heavy stone, and was useless as a means of keeping the car in its place. Apparently this was the direct and proximate cause of the accident. If there was negligence of workmen in failing to block the wheels with pieces of wood, as an additional precaution, that does not relieve the party responsible for the use of this defective car. The grade was not so steep that a proper brake could not control the car, and the evidence tends to show that the brake was mainly relied upon, and might properly be relied upon, for that purpose. It was important that a car to be used in that place should have a good brake, and the evidence as to the condition of the brake — not merely in reference to the shoe which slipped off the wheel, but in other particulars — was such as to warrant the jury in finding that the employee, whose duty it was to look after the condition of cars furnished for loading at the quarry, was grossly negligent in permitting this car to be used. *Hartford* v. *New York, New Haven, & Hartford Railroad*, 184 Mass. 365. *Young* v. *New York, New Haven, & Hartford Railroad*, 171 Mass. 33. *Evenson* v. *Lexington & Boston Street Railway*, 187 Mass. 77. *Lutolf* v. *United Electric Light Co.* 184 Mass. 53.

The question most discussed at the argument is whether there was evidence on which the jury could find that the defendant was the party whose duty it was to see that the cars were safe

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and suitable for the use of those who were to load them. It appeared that there was a branch railroad, connecting with the defendant's railroad at West Quincy, which was used for the transportation of granite from the quarries, and was owned by the Quincy Granite Quarries Company, a corporation which was then in the hands of receivers. On this railroad there were about three miles of track in all, running in branches to the different quarries. An employee of the receivers, whose office was at West Quincy, acted as shipper, and gave orders to the defendant for cars, as they were wanted at different quarries, indicating the places to which the granite was to be shipped, so that the defendant could select cars suitable and convenient for use in making the shipments. Every day the defendant, by its regular trainmen upon a particular train, brought empty cars, leaving them at or near the places where they were to be loaded, and carried away the loaded cars. The evidence tends to show that the trainmen, while doing this, were the servants of the defendant as much as when they were running the engine and cars upon its own railroad. The nature of the contract between the defendant and the owners of the quarries does not appear, except by inference from the evidence as to the way in which the business was done; but the jury were warranted in finding that the whole business of carrying the granite from the quarries, including the selection and delivery of the cars to be loaded, was done by the defendant. The testimony was consistent with the existence of an arrangement similar to that which often is made by a railroad company with a manufacturer who owns a side track constructed on his own land, which the railroad company uses in delivering and receiving cars carrying freight to and from his factory. In such cases the whole business of moving the freight commonly is done by the railroad company, the only peculiarity in the method being the use of the manufacturer's track for a short distance, instead of the track of the railroad company. If the defendant took the freight as a common carrier from the quarries, in the ordinary way, except that it used the branch tracks under an arrangement with the Quincy Granite Quarries Company, it was liable for negligence in providing an unsafe car for use by the plaintiff and his fellow workmen.

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We are of opinion there was evidence to warrant a finding that the accident was caused by the gross negligence of the defendant's servants or agents.

The evidence tends to show that the plaintiff's intestate was in the exercise of due care.

Judgment for the plaintiff.

JOSEPH S. MONIZE *vs.* MANUEL P. BEGASO.

Essex. November 10, 1905. — January 3, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & BRALEY, JJ.

Assault and Battery. Evidence, Opinion: experts.

In an action for assault and battery in which the defendant pleaded self defence in justification, it appeared that the plaintiff and the defendant were fishermen, and that a quarrel arose between them when each was in his dory, that the plaintiff rowed toward the defendant and threw three or four oars at him in harpoon fashion, one after another, whereupon the defendant, who easily could have pulled away, tried to pull the plaintiff on board his boat, and, failing in that, jumped into the plaintiff's boat, threw the plaintiff face down over one of the thwarts, and, holding him in that position by the hair of his head, "punched" him eight or nine times as hard as he could, saying, on cross-examination, that he meant business when the plaintiff offered to fight and that he shifted hands while striking him. *Held,* that the defendant exceeded the degree of force justified by the occasion, and that the jury properly were instructed that the defendant was liable for the assault.

In an action for an assault and battery the attending physician was called as a witness by the plaintiff, and, being asked how seriously the plaintiff was injured, answered "quite seriously." The presiding judge requested the witness to answer the question in such a way as to show what he considered serious, whereupon he answered that he was afraid a clot or something of that nature might form upon the brain. This was objected to by the defendant and admitted by the judge. *Held,* that the answer was admitted properly as tending to throw light upon what in the opinion of the witness was the extent of the plaintiff's injuries.

TORT, for assault and battery. Writ dated October 6, 1902.

The answer contained a general denial, and alleged self defence in that the defendant merely repelled an attack upon him by the plaintiff, using no more force than was necessary. At the trial in the Superior Court before *Hardy*, J. the evidence disclosed the facts stated in the opinion. The judge instructed

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the jury that the force used by the defendant was unjustifiable, and that the defendant was liable. During the trial the judge admitted, against the objection and exception of the defendant, the answer, which is stated in the opinion, of the physician who attended the plaintiff during the illness which followed his injuries. The jury returned a verdict for the plaintiff in the sum of $462.50; and the defendant alleged exceptions.

M. J. McNeirny, for the defendant.

W. A. Pew, Jr., (*J. M. Marshall* with him,) for the plaintiff.

MORTON, J. It was undisputed that, on the day of the alleged assault, the plaintiff and the defendant were each in a small boat, called a dory, engaged in hauling lobster pots off Eastern Point in Gloucester. There had been a previous misunderstanding between them. The plaintiff made an insulting gesture to the defendant, to which the defendant responded in like manner. The plaintiff then held up his fists in a threatening manner and rowed down towards the defendant, and, when near him, threw an oar at him in harpoon fashion and followed it up by throwing two or three others. The defendant stood ready with an oar to defend himself, but only used it to ward off those thrown at him by the plaintiff. The plaintiff's dory in the meantime drew alongside the defendant's dory, but the defendant, instead of rowing away as he could easily have done after the plaintiff had thrown his oars at him, tried to pull the plaintiff on board his own boat with a gaff, and, failing in that, jumped aboard the plaintiff's boat, when they clinched, and the defendant threw the plaintiff so that he fell face down, as the defendant meant he should, over one of the thwarts, and the defendant held him in that position by the hair of the head and "punched" him eight or nine times as hard as he could. The defendant further said on cross-examination that "the man had been imposing upon him; that he was going to punish him a little mite; that the man was aggravating him and he would not stand all that; that he meant business when the plaintiff offered to fight; that he shifted hands while striking him." He also testified on cross-examination, "that he was sorry afterwards, when he saw the plaintiff's face and realized when he turned around that he was pretty badly hurt." It is plain, we think, that the assault was unjustifiable, and in no proper sense in his own defence. At the time when

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it took place there was nothing whatever to prevent the defendant from rowing away and leaving the plaintiff. He not only did not try to do that, but tried first to pull the plaintiff into his own boat, and, failing in that, jumped into the plaintiff's boat, and when he had him at his mercy, proceeded to punish him because he had aggravated him. The fact that he supposed that the plaintiff had a knife because all lobster fishermen have one to cut bait with did not justify him. It was not shown that the plaintiff had a knife, or that, if he had, he made any movement or threat to use it. Neither did the fact that the plaintiff was willing to fight and provoked the assault and assaulted the defendant first justify him in continuing the assault when it was evident that it was no longer necessary to do so for the purposes of self defence. Ordinarily the question how far a party may properly go in self defence is a question for the jury, not to be judged of very nicely, but with due regard to the infirmity of human impulses and passions. But where, as here, taking the case most favorably for the defendant, it is plain that he exceeded the limits justified by the occasion, it was the duty of the judge so to rule and instruct the jury.

The attending physician was called as a witness by the plaintiff and was asked how seriously the plaintiff was injured and answered "quite seriously." The presiding judge requested the witness to answer the question in a little different way so as to get at what he considered as serious, and the witness answered that he was afraid a clot or something of that nature might form upon the brain. This was objected and excepted to by the defendant. The answer was properly admitted, we think, as tending to throw light upon what, in the opinion of the witness, was the extent of the plaintiff's injuries.

The result is that the exceptions must be overruled.

So ordered.

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GEORGE L. JEFFERY *vs.* FITZ W. WINTER & another.

Essex. November 10, 1905. — January 3, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & BRALEY, JJ.

Land Court. Practice, Civil, Appeal. *Deed,* Construction.

A petition to the Land Court, for registration of title, by the owner of a portion of a dwelling house, divided vertically, against the owners of the remaining portion, alleged no boundary on the side next the respondents' lot other than the land of the respondents. The petitioner appealed from the decree of the Land Court to the Superior Court on issues framed by the Land Court under R. L. c. 128, § 13, as amended by St. 1902, c. 458. The issues were framed as follows: "1. Have the respondents any right, title or interest in the real estate claimed by the petitioner? 2. If the respondents have any right, title or interest in the real estate claimed by the petitioner, what is it?" A judge of the Superior Court reported the case for determination by this court on matters of law. It appeared by the record that the parties made conflicting claims in the Land Court in regard to the ownership of a strip of land which depended on the location of the boundary line between their respective properties, and that the judge of the Land Court made findings on this subject. *Held,* that, although the issues might have been framed in better form to present the questions to be answered in the Superior Court, yet, read in connection with the findings of the judge of the Land Court, it appeared that the issues were intended to present to the Superior Court the question of the title to the strip of land in dispute.

The owner of land on which stood a two story and a half wooden dwelling house conveyed "The southerly half of my dwelling-house in G. as the same is divided by the partition from the northerly part of said dwelling-house, together with the southern half of the land adjoining thereto, reserving liberty of a free passage into and out of the cellar by and through the fore cellar doorway, together with all the privileges and appurtenances to the same half house and land any way belonging." The partitions running through the house from east to west on the first and second floors were substantially although not exactly in the same vertical line and divided the house into nearly but not exactly equal parts. They also ran nearly but not exactly in a straight line through the house from front to rear. The partition in the attic was in a straight line dividing the house about equally but was not in a vertical line with the other partitions, being nearer the exact middle of the house. There was no cellar under the rear part of the house. There was a partition in the cellar but its line was very irregular. *Held,* that the deed passed the title to that part of the structure which was south of the line of the partition in each story, that the cellar on each side was appurtenant to the house above, and that the land adjoining the house was intended to be divided by the same general line that divided the house; that the partitions of the first and second stories, running east and west, if in the same vertical line and with the same termini at the front and the rear of the house, should determine the ownership of the adjoining land, or, if it should appear that there was a difference in the termini of the partitions of the first and second stories, the termini of the first story should fix the boundary line of the land. It was

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not disputed that there was an easement of a right of mutual support and shelter for the several portions of the house belonging to the respective owners.

If one owning land with a dwelling house on it conveys about one half of the land and house, dividing the house vertically and making the boundary on each floor a partition nearly but not exactly in the centre of the house, the partitions on the different floors not being in the same vertical line, the grantee and the grantor each has an easement to maintain that part of the structure which belongs to him and extends over the land of the other.

Where an appeal has been taken from a decree of the Land Court to the Superior Court on issues framed by the Land Court under R. L. c. 128, § 13, as amended by St. 1902, c. 458, and a judge of the Superior Court reports the case for determination by this court on matters of law, the case after decision by this court goes to the Superior Court, which must determine finally the matters involved in the appeal, and remand the case to the Land Court under § 14 of the same chapter.

PETITION, filed in the Land Court on July 7, 1904, for the registration of the title to two parcels of real estate in Gloucester.

The first parcel to which the petition related was described as follows:

"A parcel of land situated on the western side of Pleasant street, and is bounded northerly by land of Fitz W. and Mary E. Winter; easterly by said Pleasant street; southerly by land of Grafton and Butman and Albert H. French seventy-nine and 25/100 (79.25) feet and by the second parcel of land herein described forty-six and 85/100 (46.85) feet; and westerly by land of Joseph O. Proctor twenty-seven and 92/100 (27.92) feet."

The second parcel sought to be registered was not involved in this controversy.

The petitioner and the respondents own adjoining lots of land on Pleasant Street, in Gloucester. In 1771 the land of the petitioner and that of the respondents formed a single lot of land then owned by one David Ingersoll. At that time there was situated upon the land so owned by him a dwelling house, the southerly portion of which, with the southerly portion of the land, was conveyed by Ingersoll to one James Odell, through whom the petitioner claimed. The northerly portion was conveyed by the heirs of David Ingersoll to one Benjamin Tarbox, through whom the respondents claimed. The description in this deed is quoted in the opinion on page 95. The dwelling house situated upon the land of Ingersoll was and still is partly upon

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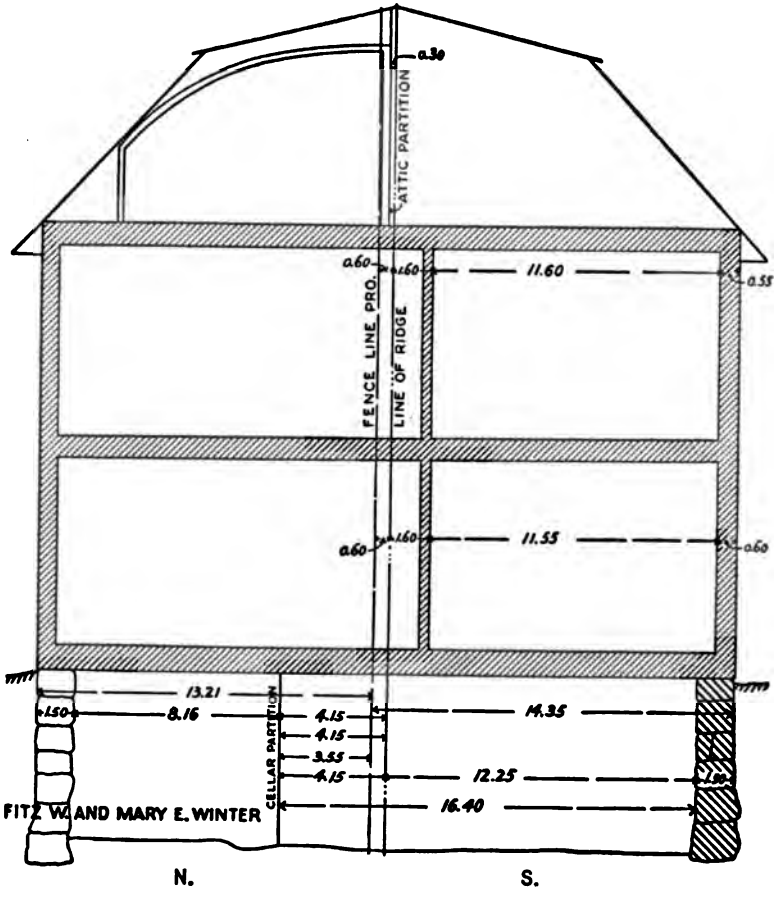
the land now claimed by the petitioner and partly upon the land claimed by the respondents. The partitions in the cellar and in the various floors of the dwelling house are not in the same line.

The house standing upon the premises is a two story and a half wooden frame dwelling house, the northerly portion having been occupied by the respondents and their predecessors in title since 1790, and the southerly portion having been occupied by the petitioner and his predecessors in title since 1771.



The house is so constructed that the portion situated on the petitioner's land cannot be materially interfered with without danger or hurt to the support and shelter afforded by that half

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to the portion which is situated upon the land of the respondents, unless some suitable support or shelter is substituted therefor.

The partitions of the various floors separating the northerly from the southerly portion of the house at the easterly end on Pleasant Street are shown upon the reduced copy on page 92 of a vertical section plan which was one of the exhibits attached to the report of the judge of the Superior Court hereafter mentioned. This plan also shows the line of the ridge pole and the line of the fence separating the yards of the petitioner and the respondents produced through the house.

The Land Court made the following decision:

"1. That the boundary line between the petitioner and the respondents is the line of the fence to the house, and thereafter the line of the partition in the cellar protracted to the street; and,

"2. That the petitioner's title is subject to, and also has the benefit of an easement of the right of occupation, so long as the present house stands, in accordance with the partitions in the several stories thereof and an easement of the right to mutual support and shelter for the several portions of said house belonging to the respective parties."

The petitioner appealed to the Superior Court on the following issues framed by the Land Court under R. L. c. 128, § 13, as amended by St. 1902, c. 458:

1. "Have the respondents any right, title or interest in the real estate claimed by the petitioner?"

2. "If the respondents have any right, title or interest in the real estate claimed by the petitioner, what is it?"

In the Superior Court the case was heard by *Lawton*, J., without a jury. He found that the partition referred to in the Ingersoll-Odell deed was the partition in the cellar, and also found that the grantors of the petitioner acquired title by exclusive possession, under a claim of right to the land under the southerly half of the house west of the easterly chimney, and as far north as the partition on the lower floor where there is no cellar, and to the northern wall of the cellar jog where there is no chimney. He ruled that no question of the location of the boundary or division line of ownership between the adjoining estates of the petitioner and of the respondents was open on the appeal and, except so far as modified by his above finding

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as to adverse possession, gave a ruling, requested by the respondents, that "as a matter of law the boundary or division line of ownership between the adjoining estates of the appellant and of the appellees on Pleasant Street, Gloucester, must be taken to be the line of the fence to the house and thereafter the line of the partition in the cellar protracted to the street, as set forth in the ruling of the Land Court."

The judge reported the case for determination by this court, the terms of reservation concluding with the sentence quoted in the opinion on page 98. The material facts appear either in the foregoing statement of the case or in the opinion.

W. A. Pew, Jr., for the petitioner.

W. O. Underwood, for the respondents.

KNOWLTON, C. J. This is a petition to the Land Court to register the title to two parcels of land in Gloucester. The controversy relates only to the first of these parcels. After a decision and an order for a decree in the Land Court, the petitioner appealed to the Superior Court, under the provisions of the R. L. c. 128, § 13, as amended by the St. 1902, c. 458. Under this section issues for the appeal were framed in the Land Court as follows: "1. Have the respondents any right, title or interest in the real estate claimed by the petitioner? 2. If the respondents have any right, title or interest in the real estate claimed by the petitioner, what is it?" The controversy between the parties relates to the location of the boundary line between their estates, and inasmuch as the description of the petitioner's lot gives no boundary on the side next the respondents' lot, other than the respondents' land, it is now contended that nothing is open on the appeal from the decree of the Land Court. The contention is that the petitioner's claim of title extends only to the true boundary line, and therefore that the respondents have no right or title in the estate claimed by him, the question where the true boundary is having been finally and conclusively settled by the decision of the Land Court. But the record shows that the parties made conflicting claims in the Land Court, in regard to the ownership of a strip of land and the location of the boundary line. The petitioner's claim of ownership was to a line northerly of that found by the Land Court to be the boundary; and the respondents claimed as owners a part of that which the

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petitioner claimed in his petition, if we construe the petition according to his contention as to the location of the respondents' boundary line. The confusion comes from the fact that the description of the land in the petition does not state the boundaries with such definiteness as plainly to show their location on the land. According to the contention of the respondents, the appeal is meaningless and the issues are of no effect.

We are of opinion that this contention is erroneous. The issues might have been framed in better form to present the questions to be answered in the Superior Court. But they are to be read in connection with the findings of the judge of the Land Court, which are a part of the record. Reading them in this way, we see that they are intended to present to the Superior Court the question of title to the land claimed by the petitioner, up to the line which he calls his boundary.

The line in dispute runs through a dwelling house. The deed under which the petitioner claims, which originally divided the ownership of the property, was made in 1771, and it describes the premises conveyed as follows: "The southerly half of my dwelling house in the Harbor, so called, in Gloucester aforesaid, as the same is divided by the partition from the northerly part of said dwelling house, together with the southern half of the land adjoining thereto, reserving liberty of a free passage into and out of the cellar by and through the fore cellar doorway, together with all the privileges and appurtenances to the same half house and land any way belonging." The southerly half of this house is now owned by the petitioner, and the northerly half by the respondents. An ell has been built at the rear of the westerly end of the petitioner's house, the part next to the main house being ancient, and the remainder, further westward, being of recent construction. The plans also exhibit that which appears to be an ell on the westerly end of the respondents' house, and there is nothing in the record to show when it was built. These ells are not separated from each other by any partition, but by an open space, not built upon. While the fact does not distinctly appear, we infer from the description in the deed that neither of them was in existence when the deed of division was made.

Looking at this deed, to which both parties go back to deter-

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mine the boundary, it is plain that it is a conveyance of that part of the building which lies southerly of the line of partition that separates the southerly part from the northerly part, so as to divide it nearly in halves. The southerly part of the building as a structure is conveyed as real estate. The difficulty in the case arises from the location of the partitions. The partitions running through the house from east to west, on the first floor and on the second floor, are in substantially, although not exactly the same vertical line, and they divide the house into two very nearly equal parts. They also run in very nearly, but not exactly, a straight line through the house from front to rear, although there are slight irregularities in connection with the construction of rooms upon the opposite sides of the line. The partition through the attic seems to be a straight line, dividing that part of the house equally, or about equally, into two parts, one on the northerly and the other on the southerly side of the partition. As the word "partition" and not "partitions" is used in the deed, we have no doubt that the lines of partition in different stories of the structure were thought of as if they were a single partition, dividing the house in halves, and that the petitioner's predecessor acquired a title to that part of the structure which is southerly of the line of the partition in each story.

The next and most difficult question is, what is the line of the land, which was conveyed in these words, namely: "together with the southern half of the land adjoining thereto." The dwelling house is treated as divided in halves by the partition, and we think it follows that the land adjoining thereto was intended to be divided by the same general line that divides the house. Inasmuch as the partitions in the first and second stories are in very nearly the same vertical line and in the same general course, being almost straight, we think they should determine the ownership of the adjoining land. The attic is an unimportant part of the building, and the partition there departs but little from the line of the two lower stories. So far as we can determine from the plans and the record, the termini of the partitions on the first and second floor at the front and rear of the main house are in the same vertical line, and we think that they should be taken as the termini of the boundary line of the land under the house, which line is to run in a straight course

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between these two points and to continue in the same direction to the street in front. If upon a further hearing it appears that there is any difference between the first and second stories in regard to the termini of the partitions at the front and rear of the main house, we are of opinion that the termini of the first story should be taken as the location of the boundary line of the land. Of course, each party had, under the original deed of division, an easement over the land of the other, giving him a right to maintain that part of the structure which belonged to him and which extended beyond the line of his land.

There was no cellar under the rear part of the house on either side, although on the southerly side the cellar extended back farther than on the northerly side. So far as there was a partition in the cellar, its line was very irregular, and cannot have been intended to designate the boundary line of the land, under the deed of division. The only line referred to in that deed is the partition that divides the house as a structure. The ownership of the land is made to depend upon the line that marks the ownership of the different parts of the house.

The facts reported do not indicate that any rights in the land now in question have been gained by adverse possession. The cellar on each side was appurtenant to the house above, and the cellar and the other appurtenances are expressly referred to in the deed. There was an implied easement created in favor of each party, which permitted him to keep and use the cellar as a part of the house or as appurtenant to it, so long as the house should stand. So far as either party has used any part of the cellar beyond the boundary line of his land, he must be held to have used it by virtue of the easement secured to him by the deed, and not adversely. The result is that the rights of the parties in the cellar, outside of the line of their land, are like their rights in the house above. In regard to the house the Land Court made this decision: "That the petitioner's title is subject to, and also has the benefit of an easement of the right of occupation, so long as the present house stands, in accordance with the partitions in the several stories thereof, and an easement of the right to mutual support and shelter for the several portions of said house belonging to the respective parties." We understand that neither party seriously questions the correctness

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of this decision, and we see no reason for doubting it. *Adams* v. *Marshall*, 138 Mass. 228. *Pierce* v. *Dyer*, 109 Mass. 374. *McKenna* v. *Eaton*, 182 Mass. 346. So far as it may be applicable, it applies to the cellar, as well as to the structure above.

The report shows that there is a fence in the rear of the house, which terminates at the house, and is treated in some part of its course as a boundary. The record does not show at what point it meets the house, and there is nothing before us that enables us to determine the boundary westerly of the westerly end of the house as it was in 1771. We assume that there was evidence before the Land Court relating to that part of the property.

A part of the report is in these words: "If such further rulings are not correct, then the case is to be remanded to the Land Court for a decree with such directions from the Supreme Judicial Court as the facts and the law require."

An appeal having been taken upon certain points from the Land Court to the Superior Court, under the R. L. c. 128, § 13, and the St. 1902, c. 458, and the report to this court being only of questions of law which arose in the Superior Court, our decision upon these questions must go directly to the Superior Court, and the matters involved in the appeal must be finally determined by that court. Its decision will then be remanded to the Land Court. This follows from a proper interpretation of the R. L. c. 128, § 14. It is only when questions of law come directly to the Supreme Judicial Court from the Land Court that this court makes a certificate of its decision to that court.

The case will be further heard in the Superior Court, and a decision entered in accordance with the law as stated above.

So ordered.

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ALBERT E. WHITE *vs.* WILLIAM H. PERRY COMPANY.

Suffolk. November 13, 1905. — January 3, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Negligence, Employer's liability.

In an action by a workman employed by a corporation, in the shipping of some old railroad iron, against his employer, for injuries from a fall caused by the slipping of a sleeper forming part of a temporary platform on which he was standing while pushing a rail into a car which he was assisting in loading, it appeared that the platform was made of four sleepers weighing about one hundred and eighty pounds each, the lower two laid at right angles with the track and the upper two laid parallel with the track and near it, and that the sleepers were not spiked together. It further appeared that the platform was constructed under the direction of one who could have been found to have been acting as the defendant's superintendent, and the plaintiff testified that he had nothing to do with putting the sleepers in position and did not see the construction of the platform, heard no orders given about it, and did not know that the top sleepers were not spiked down, supposing until the time of the accident that they were secure. *Held*, that the jury were warranted in finding that the platform, although temporary in its nature, was an appliance provided by the defendant, through its superintendent, for the use of the men who were engaged in loading the cars, and that the questions whether the superintendent was negligent in not fastening the sleepers together, whether the plaintiff assumed the risk of the accident, and whether he was in the exercise of due care, were for the jury.

MORTON, J. This is an action of tort for personal injuries while in the employ of the defendant corporation and engaged in shipping some old railroad iron. There was a verdict for the plaintiff, and the case is here on exceptions by the defendant to the refusal of the judge to rule as requested that the plaintiff was not entitled to recover.

The plaintiff was assisting in loading a car with rails, and, while standing on a platform made of sleepers, was in the act of pushing a rail over the side of the car, when in consequence, as he contended, of the slipping of one of the sleepers, his foot went down, and the rail crushed his wrist against the side of the car and broke it. The platform was made of four sleepers weighing about one hundred and eighty pounds each. Two were laid on

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the ground at right angles with the track, and two others parallel with the track placed upon them side by side and close to the track end of the lower ties. The platform was made so as to enable the men to reach the top of the sides of the car, and was temporary in its nature. It was constructed under the direction of one McIntosh, who, the jury could have found, was acting as the defendant's superintendent or foreman. The sleepers were not spiked together because, as he testified, "they were very heavy and it did not seem to be necessary so to do." There was contradictory testimony on the question whether the plaintiff assisted in putting the sleepers in position, McIntosh testifying that he did, and the plaintiff testifying that he had nothing to do with it, did not see any of the operation of constructing it, and heard no orders given, and did not know that the top sleepers were not spiked down, and supposed down to the time of the accident that they were all secure.

We think that the ruling was right and that the exceptions must be overruled. It was competent for the jury to find that the platform, though temporary in its nature, was an appliance provided by the defendant, through its superintendent, for the use of the men who were engaged in loading the cars with rails. And the question whether he exercised due care in making it as he did, or whether it should have been fastened together, was for the jury. *Millard* v. *West End Street Railway*, 173 Mass. 512. *Murphy* v. *New York, New Haven, & Hartford Railroad*, 187 Mass. 18. The jury could have found, and no doubt did find, that the plaintiff did not know that the sleepers were not fastened together. It could not, therefore, have been ruled as matter of law that the plaintiff assumed the risk of such an accident as occurred. The jury also could have found, as bearing on the question of the plaintiff's due care, that he had a right to rely upon the fact that the sleepers had been put there by the direction of McIntosh and that he would cause them to be securely placed. He was not bound to examine the appliance himself, and his failure to do so could not be imputed to him as negligence on his part. And, though the appliance was a simple one, it could not be ruled as matter of law that the risk of such an accident as occurred was so obvious, in

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view of his ignorance as to the manner in which the sleepers were secured, that he must be held to have assumed it.

Exceptions overruled.

C. S. Knowles, for the defendant.

C. P. Sampson, for the plaintiff.

FRED J. TABER *vs.* CITY OF BOSTON.

SAME *vs.* NEW ENGLAND RAILROAD COMPANY.

Suffolk. November 13, 1905. — January 3, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Damages. Grade Crossing Acts. Mortgage, Of real estate. *Evidence.*

A mortgagee of land not in possession, who has no other title to the land, cannot recover damages for the taking of the land under St. 1900, c. 453, confirming a report of commissioners abolishing certain grade crossings in Boston, under a petition which alleges that he is the owner of the unincumbered fee and does not follow the requirements of R. L. c. 111, §§ 112, 113, in regard to petitions by mortgagors and mortgagees.

A mortgagee of land not in possession, who has filed a petition for damages for the taking of the land in the abolition of a grade crossing, in which he has alleged that he is the owner of the unincumbered fee, cannot be allowed to show that he made an agreement partly oral and partly by letter with the mortgagor for the purchase of the equity of redemption under which he made certain payments on account of the purchase price, and thus became entitled to damages as owner of the equity of redemption, if it appears that the agreement between the parties was executory and finally was reduced to writing and embodied in a bond for a deed of the land which was executed and delivered after the taking.

A mortgagee of land not in possession under the mortgage, who has filed a petition for damages for the taking of the land in the abolition of a grade crossing, in which he has alleged that he is the owner of the unincumbered fee, cannot prove a possessory title sufficient to maintain the petition by showing that he went upon the land, placed a stone crusher on it, did some work there getting out stone, apparently under a license from the mortgagor, and had negotiations with the mortgagor about buying the property, which after the taking ripened into a bond for a deed of the land.

SHELDON, J. These are petitions for the assessment of damages to the petitioner's property in Boston caused by the abolition of the grade crossing of Blue Hill Avenue and Oakland Street by the New England Railroad and the consequent changing of the grade of Oakland Avenue and other streets.

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The petitions as amended recited that the petitioner, on April 12, 1901, "was and now is the owner of unincumbered fees in the following lots of land," describing several parcels of land by their numbers as shown on a plan mentioned, and including lots numbered 24, 25, 41, 55, 56, 57, 58, 59, on said plan. The parties agreed at the trial that the petitioner's damages should be assessed one half against each respondent.

It appeared at the trial that on the petition of the mayor and board of aldermen of the city of Boston a commission had been appointed by the Superior Court for the abolition of these grade crossings, and the commissioners made and filed their report on June 25, 1900; this report was confirmed by the St. of 1900, c. 453; and on April 12, 1901, the mayor of the city of Boston, under that statute, filed in the registry of deeds for the county of Suffolk a plan and statement signed by him showing the lands and rights taken and the alterations to be made; and both parties agree that the date of this filing is the date of the taking, and that the petitioner's rights were then fixed and his damages are to be determined as of that date.

It appeared that the petitioner at the time of the taking was the owner in fee of all the land described in his amended petitions, except the lots added by the amendments, being lots numbered 24, 25, 41, 55, 56, 57, 58 and 59, called the Hartleb lots. These lots he had sold and conveyed to a Mrs. Hartleb of Maine, by deed dated March 6, 1895, and duly recorded six days later. In payment of the purchase money Mrs. Hartleb paid him about $6,000 in money, and she and her husband also gave to him their note for $2,000 dated March 9, 1895, and payable in two years from that date, secured by a mortgage on these lots, also dated March 9, 1895, and recorded at the same time as his deed to Mrs. Hartleb.

The jury found in each case for the petitioner, and found specially in each case that the damages to his property other than the Hartleb lots were $8,850; that of the Hartleb lots the damages to lots 24, 25 and 41 were $1,770; and that there was no damage to lots 54 to 59, inclusive, — these amounts being in each case for one half of the petitioner's total damages. Thereupon the judge ruled that the damages assessed by the jury for lots 24, 25 and 41 could not be recovered upon the petition as

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now framed, and directed judgment accordingly, and the case is here upon the petitioner's exception to this ruling, with a statement in the bill of exceptions that if the ruling and order are erroneous judgment is to be for the full amount of damages as assessed by the jury.

After the bill of exceptions was filed and before it was allowed, agreements were made between the petitioner and each respondent separately, which it was stated were substantially a duplicate of an exhibit attached to the bill, which agreements are made a part of the exceptions. The exhibit reads as follows:

"Taber *v.* City of Boston.

"Whereas after a trial before a jury of the Superior Court in Suffolk County the jury made a finding of seventeen hundred and seventy dollars for lots twenty-four, twenty-five and forty-one, and of eight thousand eight hundred and fifty dollars for damage to the rest of the property; and

"Whereas the court ruled that the petitioner could not, under his petition, recover damages for lots twenty-four, twenty-five and forty-one, and ordered a verdict to be rendered on said finding of eight thousand eight hundred and fifty dollars; and

"Whereas it was desired by both parties to settle the amount of said verdict as so ordered by the court; and

"Whereas the defendant city has paid to the plaintiff said sum of eight thousand eight hundred and fifty dollars with interest on the same from March 25, 1904, to date, together with the costs of suit;

"It is agreed that said sums were received in full satisfaction and discharge of all claims of the petitioner under said petition except his claims for damages to lots twenty-four, twenty-five and forty-one, and that his exceptions are hereby withdrawn except such exceptions as relate to the evidence as to said lots and the petitioner's right to recover the damages which came to said lots; and it is agreed that if he does not successfully prosecute his said exceptions to the rulings of the court excepted to, such entry may be made as the court deems proper, and that if the Supreme Judicial Court decides that petitioner can recover for damages sustained by said lots twenty-four, twenty-five and forty-one then such entry is to be made as the court deems proper.

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"Received of the City of Boston the sum of $ being $8,850.00 with interest thereon from March 25, 1904, to date, the same being the unquestioned amount of damages and interest in the verdict of said date and $ being costs of suit, on a petition by Taber *v.* The City of Boston to recover damages to his property on account of the abolition of the grade crossings of Blue Hill Avenue, Oakland Street and the New England Railroad Co. The above amounts being the finding of a jury of the Superior Court of the unquestioned damages and costs of suit which came to the estate of said Taber in consequence of the abolition of said grade crossings."

It accordingly appears that the petitioner, on April 12, 1901, when the damages upon these lots accrued, held no title to them by deed other than as a mortgagee; that he had made no entry under this mortgage; and that according to the record title his rights are simply those of a mortgagee not in possession. The first question consequently is whether as such mortgagee he can recover damages under these petitions.

The rights of the mortgagee as such to recover for damages caused by a taking of the mortgaged property under a public right have been so recently and so fully considered by the court that there is no occasion again to go over this ground. See *Bates* v. *Boston Elevated Railway*, 187 Mass. 328, 337 *et seq.*, and cases there cited. It is now settled that his right to maintain such petitions as these depends entirely upon statute. R. L. c. 48, § 114; c. 111, §§ 112, 113. This makes it unnecessary to consider the nature of the estate of the mortgagee, or the extent of his rights either against the mortgagor or as to third parties, and makes a large part of the petitioner's elaborate argument and many of the decisions referred to by him immaterial upon the question now under consideration. Outside these statutes, as pointed out in *Bates* v. *Boston Elevated Railway*, *ubi supra*, the mortgagee had simply the right to follow in equity the land taken and subject its proceeds, the compensation for the damages caused by the taking, to a lien for the payment of the mortgage debt due to him. And, as is also shown in the same case, p. 338, the statute did not give to the mortgagee any new rights, but gave to the court of law which had to assess the compensation jurisdiction

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to protect and enforce his equitable right. It is accordingly provided that if the land is mortgaged, any petition for the estimation of such damages shall state all mortgages which are known to exist upon the property, and notice is to be given to all parties who are interested as mortgagors or mortgagees. R. L. c. 111, § 112. And § 113 further provides that "If mortgagors or mortgagees commence or become parties to such proceedings, entire damages shall, upon final judgment, be assessed for the property taken, and such portion thereof shall be ordered to be paid to every mortgagee who is a party in the order of his mortgage, as is equal to the amount then unpaid thereon, and the balance to the mortgagor; and separate judgment shall be entered accordingly for each mortgagee, who shall hold his judgment in trust, first, with any proceeds realized thereon, to satisfy his mortgage debt, and, after such debt is in any way satisfied, to assign the judgment or pay over any balance of proceeds to the mortgagor or other person entitled thereto." It is manifest that these provisions contemplate an entirely different petition and wholly different proceedings from those adopted in the case at bar. And although these are doubtless enabling statutes made to give a further and more extensive remedy than theretofore was available, yet in view of the fact that the mortgagee before the enactment of the statutes had no right, either alone or with the mortgagor, to bring or to prosecute any petition for the recovery of such damages, his right cannot be extended beyond the terms of the statutes. The language used by the Legislature is affirmative and permissive, but strictly limiting the nature of the proceedings allowed. *Commonwealth* v. *Smith*, 10 Allen, 448, 457. The petitioner cannot recover as mortgagee.

But the petitioner claims that by an oral agreement he had repurchased from Mrs. Hartleb the equity of redemption. The evidence admitted falls far short of showing such an agreement. The petitioner testified that in 1899, in a talk with Mrs. Hartleb in Maine, he asked her "What she would let us go on to these lots here, in regard to getting off stone," and that she said she would sell the property to him under certain conditions, and that he agreed, made her a proposition, and asked her what she would take for the property and she said she did not know, and

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wanted him to make a proposition; that he did so, and in the summer of 1901, which must have been some time after the taking, she gave him a bond for a deed of the property. (It afterwards appeared that this bond was dated August 1, 1901.) He also testified that after a talk with Mrs. Hartleb's husband, in the spring or summer of 1900, he "went on to the property, placed a stone crusher on it, and took possession of it and used it"; that he used the stone crusher for material there and worked there on the property getting out stone for a boulevard. This bond was offered in evidence, but was excluded, apparently because it was given after the taking, although afterwards admitted. Manifestly, on this evidence it could not be found that the petitioner had made any oral agreement with her for the purchase of the equity of redemption; and we need not consider what the effect of such an oral agreement would have been. R. L. c. 74, § 1, cl. 4; c. 127, § 3. Certainly the decisions in *Trull* v. *Skinner*, 17 Pick. 213, *Falis* v. *Conway Ins. Co.* 7 Allen, 46, and *Stone* v. *Jenks*, 142 Mass. 521, are far from maintaining the proposition contended for by the petitioner, that a mortgagee purchasing by oral agreement the right to redeem acquires the fee.

The petitioner contends however that evidence upon this issue was wrongly rejected. He testified that he made an agreement with Mrs. Hartleb in the last part of 1899 or 1900; that this agreement was in writing only so far as some letters passed between them, one of which she signed and sent back to him; that he had made diligent search for her letters and could not find them; that the agreement between him and her was contained in those letters. He was then asked to state the agreement; whether there was any agreement between him and her as to the price of the lots, and whether he had paid the taxes on this property at any time before 1901. The petitioner also offered to show what the price of the lots was, and what payments he had made on account of that purchase price. All this evidence was excluded, and the petitioner excepted. We think that all this evidence was excluded rightly; for it appeared that the agreement between the parties was finally reduced to writing and embodied in the bond of August 1, 1901, which merged all the agreements that led to it. This bond purported upon its face to contain the entire agreement between the parties. *Kin-*

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nard Co. v. *Cutter Tower Co.* 159 Mass. 391, and cases there cited. It is to be observed that the petitioner did not seek to show an executed verbal agreement by which he became the owner of the equity of redemption, but merely to show the terms of an executory agreement, which appear to have been subsequently embodied in the bond which was given to him by Mrs. Hartleb; and it was wholly immaterial whether he had made any partial payments under such an agreement, whether as taxes or otherwise.

It follows that the petitioner cannot recover for the damages to these lots on the ground that he had become the owner of the equity of redemption.

The petitioner contends further that upon the evidence admitted and offered he had a good possessory title to the land, and so is entitled to the damages; and he relies on *State Lunatic Hospital* v. *Worcester County*, 1 Met. 437; *Hawkins* v. *County Commissioners*, 2 Allen, 254, 256; *Chandler* v. *Jamaica Pond Aqueduct*, 125 Mass. 544; *Andrew* v. *Nantasket Beach Railroad*, 152 Mass. 506. But we do not think that it appeared that the petitioner had a good possessory title. He held a mortgage under which he had not taken possession. He had gone on the property, placed a stone crusher upon it, and done some work there getting out stone, apparently under a license from the real owner or her husband. He had had negotiations with her about buying the property, which after the taking ripened into the bond for a deed which has been spoken of, under which he was to have a deed of the property upon paying $6,000 besides the mortgage which he held. He never disputed her title; there is nothing except his bringing these petitions to show that he ever asserted any claim other than that under his mortgage, or by her license. Such possession as he had was not under a claim of present title, but was under the right of Mrs. Hartleb, and subordinate to her paramount title. This is very much less than what was shown and passed upon in any of the decisions referred to. We are of opinion that he cannot recover the damages here in question on the ground of a possessory title.

The result is that on this record the petitioner's exceptions must be overruled. Whether any amendment can be made that

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will be of avail to him, and whether he shall be allowed to make any amendment if he shall ask leave to do so, are questions to be passed upon by the Superior Court.

Exceptions overruled.

J. C. Ivy, for the petitioner.

T. M. Babson, for the respondents.

HARRY S. ROBERTSON *vs.* BOSTON AND NORTHERN STREET RAILWAY COMPANY.

Middlesex. November 14, 1905. — January 3, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Practice, Civil, Exceptions. *Rules of Court. Negligence. Carrier*, Of passengers. *Street Railway.*

Under Rule 48 of the Superior Court a judge of that court may receive a request for an instruction after the closing arguments and allow an exception to his refusal of the request.

If a person boards a street car, which has stopped to allow another person to alight, erroneously supposing that it is going to his destination, and, on the conductor calling out "This car goes to the stables only," tries to alight from the car and is injured by its suddenly starting, he cannot maintain an action for his injuries against the company operating the car if it has exercised ordinary care, because the company has not accepted him as a passenger at the time of the accident, and he himself has abandoned the intention of becoming a passenger on hearing the announcement made by the conductor.

MORTON, J. The plaintiff, with some companions, boarded in Revere at half past eleven in the evening of April 20, 1902, a car belonging to the defendant, thinking that it was the proper car to take him to his home. The car had stopped at a stopping place upon a signal from another person, meaning, as we construe the exceptions, some other person who wished to alight. After the plaintiff had boarded the car and taken a seat the conductor called out, "This car goes to the stables only," in consequence of which, after several of the plaintiff's companions had left the car, he attempted to get out, and, as he was doing so, the car suddenly started and threw him causing the injuries complained of. The stables, if that is material, were in the direction in which the plaintiff was going.

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The plaintiff alleged in his declaration that he "boarded one of said company's cars in said town with the intent of becoming a passenger, that while he was in the act of alighting . . . and in the exercise of due care, he was thrown to the street, in consequence of the sudden starting of the car," etc.

The judge instructed the jury "that the defendant owed to the plaintiff the duty of ordinary care only, and that he had not the rights of a passenger, as he had not claimed in his declaration that he was a passenger." At the conclusion of the charge the counsel for the plaintiff handed to the judge for the first time a written request, that the jury be instructed that, if they found that the plaintiff boarded the car intending to become a passenger, then the defendant was bound to exercise the same degree of care towards him as towards a passenger. The judge declined to instruct the jury as thus requested, and saved the plaintiff's exception thereto, understanding that the whole question as to the degree of care was raised by and saved to the plaintiff. Thereupon the defendant excepted to the giving by the presiding judge of an exception to the plaintiff after the arguments and charge had been completed. There was a verdict for the defendant and the case is here on the plaintiff's exceptions to the refusal of the judge to instruct the jury as above requested.

The defendant objects that under Rule 48 of the Superior Court the exceptions are not properly here because the request was not made before the closing arguments. But there is nothing in that rule to prevent the presiding judge from receiving and passing, if he so elects, upon requests for instructions presented for the first time after the closing arguments and allowing an exception to the party aggrieved by the giving or refusing of them. Receiving requests for instructions and giving or refusing them and allowing the aggrieved party an exception is in effect giving the special leave to present them that is provided for in the rule. The rule does not mean that leave must be obtained to present requests later, but that requests presented later cannot be entertained without the leave of the judge.

Upon the undisputed facts the plaintiff had not been accepted by the defendant as a passenger at the time of the accident, and had himself abandoned the intention of becoming one upon hear-

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ing the announcement by the conductor. The judge therefore properly instructed the jury that the defendant was bound to exercise ordinary care only. See *Webster* v. *Fitchburg Railroad*, 161 Mass. 298; *Jones* v. *Boston & Maine Railroad*, 163 Mass. 245.

Exceptions overruled.

J. C. Woodman, (*C. Toye* with him,) for the plaintiff.

E. P. Saltonstall, (*S. H. E. Freund* with him,) for the defendant.

MICHAEL O'KEEFFE *vs.* CITY OF SOMERVILLE.

Middlesex. November 14, 1905. — January 3, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Constitutional Law. Trading Stamps. Tax, Excise. *Words*, "Commodities."

St. 1904, c. 403, attempting to impose an excise tax on the business of selling or giving trading stamps or similar devices in connection with the sale of articles, is unconstitutional and void, the right to transact business in this manner not being a commodity within the meaning of the word "commodities" in Const. Mass. c. 1, § 1, art. 4, and the restriction of such a lawful business not being a proper exercise of the police power.

KNOWLTON, C. J. This is an action of contract to recover the amount of a tax, levied upon the plaintiff's business under the St. 1904, c. 403, and paid to the defendant under protest. This statute is entitled, "An Act to impose an excise tax on the business of selling, giving or delivering trading stamps, checks, coupons or similar devices in connection with the sale of articles." The first section is as follows: "Every person, firm or corporation selling, giving or delivering trading stamps, checks, coupons or similar devices, in connection with the sale of articles, entitling the holders to receive articles other than the articles so sold, shall pay an excise tax for carrying on such business, equivalent to three per cent of the gross receipts by such person, firm or corporation from the sale of the articles so sold and from the trading stamps, checks, coupons or similar devices sold, given or delivered in connection therewith." The second section requires returns to be made semiannually by persons carrying on the

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business mentioned in § 1, showing their gross receipts from sales, and provides for the collection of the prescribed tax by the collector of taxes, upon a warrant issued by the town treasurer. Section 3 prescribes a penalty for a failure to make the returns required.

In the Superior Court the case was submitted upon an agreed statement of facts with exhibits annexed. The presiding judge found for the defendant, and reported the case for determination by this court.

Upon the stipulation of the parties and the report of the judge, the sole question presented is whether this statute is valid. The plaintiff contends that it is unconstitutional, and if his contention is correct, he is entitled to recover. Plainly it cannot stand under the first part of c. 1, § 1, art. 4, of the Constitution of Massachusetts, which gives the Legislature power to "impose and levy proportional and reasonable assessments, rates and taxes," etc., for such taxes are assessed upon property, and they must be proportional as well as reasonable. The defendant's contention is that the tax is valid under the provision, in the same article, which gives the Legislature authority "to impose, and levy, reasonable duties and excises, upon any produce, goods, wares, merchandise, and commodities, whatsoever, brought into, produced, manufactured, or being within the same," etc. It is conceded that a tax under this statute is not a tax upon goods, wares or merchandise. The first and principal question before us is whether the right to conduct the business, in the manner described in the first section, is a commodity within the meaning of the constitution.

The word "commodities," as used in this article, was considered in *Portland Bank* v. *Apthorp*, 12 Mass. 252, and was given a very broad meaning, which was derived by the court in part from the early practice of the Legislature in imposing excise duties and customs upon various articles of merchandise, and upon certain kinds of business. See St. 1781, cc. 17, 33; St. 1782, c. 33; St. 1783, c. 12; St. 1789, c. 48. In some of the later cases similar language has been used, but in others the court seems to have held that the statement, in reference to the taxation of the business of an auctioneer, or an attorney, or a tavern keeper, or a retailer of spirituous liquors, that the

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Legislature "may impose the same conditions upon every other employment or handicraft," is too broad. In *Gleason* v. *McKay*, 134 Mass. 419, it was held that a statute, imposing an excise tax upon partnerships and similar associations "in which the beneficial interest is held in shares which are assignable without consent of the other associates specifically authorizing such transfer," was unconstitutional. In giving the opinion of the court, Chief Justice Morton said: "This imposition is clearly not in the nature of a license fee, but is an excise upon a franchise or privilege. The right to levy excises upon franchises has never been extended further than to corporate franchises specially granted by the government, or enjoyed and exercised by its permission. . . . We do not see how this peculiar feature can be called a commodity, subject to a special excise, any more than the agreement of copartnership itself, or any clause or part of it, or any other agreement, right or mode of transacting any business, can be called a commodity, and so liable to taxation at the will of the Legislature. If this tax can be upheld, it seems to us that the necessary result will be that the Legislature has the power to select any business, occupation or calling carried on, or any natural right enjoyed, under the protection of our laws, and impose upon it at its will a special tax or excise. This would be extending the meaning of the word 'commodities' beyond any reasonable limits." In *Minot* v. *Winthrop*, 162 Mass. 113, this court decided that the right or privilege of transmitting property to one's heirs, legatees or devisees in succession, after one's death, is a commodity, within the meaning of the constitution, and so may be made the subject of an excise tax. Chief Justice Field said in the opinion, "The language of the Constitution of Massachusetts is general, and may well be held to authorize the laying of excises upon all such gainful employments and privileges as are created or may be regulated by law, and commonly have been considered legitimate subjects of taxation in other States and countries."

It is not necessary in the present case to determine the meaning of the word "commodities," in reference to every possible application of it, but we are of opinion that it is not broad enough to include every occupation which one may follow, in the exercise of a natural right, without aid from the govern-

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ment, and without affecting the rights or interests of others in such a way as properly to call for governmental regulation. Whatever may be done by the Congress of the United States under its general power to levy excise taxes, (see *Thomas* v. *United States*, 192 U. S. 363,) we are of opinion that, under the limitation to commodities, the General Court of Massachusetts cannot levy an excise tax upon the business of a husbandman or an ordinary mechanic. If this is not the necessary effect of the decision in *Gleason* v. *McKay*, *ubi supra*, it certainly is intimated by the language of the court in the opinion.

In the statute before us the selling or giving of trading stamps, in connection with the sale of articles, can hardly be considered a business in itself; but the business which the statute seeks to reach is the selling of articles under an arrangement to deliver stamps as a part of the sale, or as an accompaniment of it. The statute includes sales of articles of every kind, and it describes the delivery of stamps in terms that include deliveries which, under the decisions of this court, are entirely unobjectionable in law. *Commonwealth* v. *Sisson*, 178 Mass. 578. *Commonwealth* v. *Emerson*, 165 Mass. 146. Such deliveries have generally been considered permissible in connection with the sale of articles, in the exercise of a common right, and many cases have been decided which invalidate statutes or ordinances intended to prevent such deliveries. *People* v. *Gillson*, 109 N. Y. 389. *People* v. *Zimmerman*, 102 App. Div. (N. Y.) 103. *Ex parte McKenna*, 126 Cal. 429. *State* v. *Dalton*, 22 R. I. 77. *Long* v. *State*, 74 Md. 565. *Young* v. *Commonwealth*, 101 Va. 853. *State* v. *Shugart*, 138 Ala. 86. *State* v. *Dodge*, 76 Vt. 197. *Winston* v. *Beeson*, 135 N. C. 271.

Even if the Legislature might constitutionally impose an excise tax upon the business of selling articles in the usual way, it has not attempted to do so, and this statute, if it were construed in reference to the general business of selling alone, would be unreasonable and unconstitutional, because it would impose a tax upon some vendors and not upon others. We are therefore brought to the question whether the peculiar way of selling, to which the statute relates, involves a material difference in the nature of the business, such as to warrant the imposition of an excise tax on that account. The only difference referred to is

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the giving or delivering, as a part of the sale or in connection with it, of a stamp, or other similar device, which represents an additional right of property. Because this is entirely legitimate (see cases above cited) the attempt to tax it, as a peculiar kind of sale, is "a discrimination founded upon an immaterial fact," which renders such a statute invalid. *Minot* v. *Winthrop*, 162 Mass. 113, 122. Taking the acts referred to in the broad terms of the description in the statute, they are not dependent for their legality upon the legislative will, nor do they call for legislative regulation. They are performed in the exercise of a natural right, and are not in any sense rights or privileges conferred by law.

If these stamps were used in such a way as to constitute a lottery or game of chance, the use would be punishable. But this statute purports to deal with such methods of sale as appeared in *Commonwealth* v. *Sisson*, 178 Mass. 578, and in other cases above cited.

One of the reasons why these methods are allowable is found in the familiar principle that constitutional liberty means "the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation." The restrictions upon conduct which may be imposed in the exercise of the police power include everything that may be necessary in the interest of the public health, the public safety or the public morals, and they include nothing more. These doctrines have often been discussed and elaborated, and it is unnecessary to consider them at length in this case. In applying them to the business mentioned in this statute, no reason appears for the imposition of an excise tax upon the business of selling articles with an accompaniment of stamps which entitle the vendee to other property.

Judgment for the plaintiff.

J. H. Jones (of New York) & *R. M. Morse*, (*P. F. Hall* with them,) for the plaintiff.

F. W. Kaan, (*R. E. Joslin* with him,) for the defendant.

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CHARLES J. LOGAN *vs.* OLD COLONY STREET RAILWAY COMPANY.

FERGUS J. WHITE *vs.* SAME.

Suffolk. November 15, 1905. — January 3, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Negligence. Street Railway.

In actions against a street railway company respectively by the driver and the owner of a team, for personal injuries and injuries to the horses and wagon, it appeared that the wagon was a heavy two horse caravan fifteen or sixteen feet long and about seven feet wide, and was loaded with twelve piles from twenty-five to thirty feet long extending beyond the horses' heads and about twelve feet from the ground at the forward end, that the plaintiff in the first case was driving this team along a level and straight road at about half past seven o'clock in the evening of a day in October, when it was run into from behind by an electric car of the defendant which had not rung a gong for several hundred feet, and which struck the left hind wheel of the wagon with such force as to bend the axle and drive the wheel up against the body of the wagon and shove the wagon along about twelve feet, making gouges in the road. *Held*, that there was evidence for the jury of due care on the part of the driver and of negligence on the part of the motorman.

MORTON, J. These two actions of tort were tried together. That by Logan is for personal injuries. That by White for injuries to the horses, harnesses and wagon. The accident occurred on Coddington Street in Quincy, about a mile from the city, at about half past seven in the evening of October 3, 1902, and was caused by the team belonging to the plaintiff White which Logan was driving being run into from behind by a car of the defendant company. The usual questions of due care on the part of the plaintiff and of negligence on the part of the defendant are presented. There was a verdict for the plaintiff in each case, and the cases are here on exceptions by the defendant to the refusal of the judge to rule as requested, in substance, that neither of the plaintiffs was entitled to recover, that there was no evidence of due care on the part of Logan, and no evidence of negligence on the part of the motorman, and to such portions of the charge as were inconsistent with these requests.

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It would serve no useful purpose to attempt to review and analyze all of the testimony, and we content ourselves with a brief summary and with saying that we think that there was evidence for the jury on both questions. It was for the jury, taking all the circumstances into account, the kind of night, whether cloudy and misty or not, the manner in which Logan was driving, his knowledge or want of knowledge of the road and of the running of the cars, the extent to which he had a right to rely upon the signals of the motorman, his own condition from the want of sleep, and such other matters as they deemed bore upon the issue, to say whether Logan was or was not in the exercise of due care. It could not be ruled as matter of law that he was not, or that it was negligence on his part for him to allow his team to be so near the track that a car going in the same direction would collide with it. *Vincent* v. *Norton & Taunton Street Railway*, 180 Mass. 104.

There was evidence tending to show that the wagon was loaded with twelve piles, each from twenty-five to thirty feet long, and that the car struck the left hind wheel of the wagon with such force as to bend the axle and drive the wheel up against the body of the wagon and shove the wagon along about twelve feet, making gouges in the road; that the wagon was a heavy two horse caravan fifteen or sixteen feet long and about seven feet wide, and that the load was about twelve feet from the ground at the forward end of the piles which extended over the horses' heads; that the place of the accident was level and the road straight in the direction from which the car came for several hundred feet; and that no gong was rung after passing Newcomb Street which was several hundred feet away till just as the collision occurred. There was on the other hand testimony tending to show that the car was going at a much less rate of speed than the force of its impact with the wagon would seem to indicate, that the night was dark so that objects could only be seen at a comparatively short distance, and that the motorman did all that he could to avoid a collision as soon as he saw the wagon.

Whatever the weight of the evidence may have been, it was for the jury to say, we think, taking all the circumstances into account whether there was or was not negligence on the part

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of the motorman. We see no error in the manner in which the court dealt with the case.

Exceptions overruled.

D. E. Hall, for the defendant.

J. E. Young & J. W. Hathaway, for the plaintiffs, were not called upon.

DANIEL V. McISAAC *vs.* HAROLD ADAMS.

Suffolk. November 15, 1905. — January 3, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Infant. Necessaries. Attorney at Law.

An attorney at law who, at the suggestion of relatives of a minor, acts for the minor in the settlement of the estate of a deceased person in which the minor is interested, not being employed by a probate guardian or a guardian *ad litem* nor by the minor himself, is in the position of a volunteer rendering services which are not necessaries and cannot recover against the minor.

CONTRACT for $1,000 for professional services. Writ dated March 21, 1902.

The answer contained a general denial, and also set up that at the time of the alleged performance of the services by the plaintiff the defendant was a minor and that the services were not necessaries.

The case was tried in the Superior Court before *Mason*, C. J., without a jury. He refused to rule that the defendant was not liable to the plaintiff, and found for the plaintiff in the sum of $1,000. The defendant alleged exceptions.

H. W. Hardy, for the defendant.

J. R. Murphy, for the plaintiff.

KNOWLTON, C. J. The plaintiff is an attorney at law, and he brings this action against the defendant, a minor, to recover on a *quantum meruit* for professional services. The defendant is the grand nephew of Julius Adams, who died unmarried and without issue, leaving a will by which he disinherited his brother Durward Adams, the grandfather of the defendant. The plaintiff was employed by Durward Adams and others interested in

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the estate of Julius Adams, and he appeared for them in the Probate Court, and afterwards in the Supreme Judicial Court, and rendered services in these courts, and in making a compromise by which there was a modification of the will, which was adopted in the settlement of the estate. He also assumed to represent the defendant, and to render services to him as well as the others. It is not contended that he was employed by the defendant in person, for he testified at the trial that he had never seen the defendant. During a considerable part of this time the defendant had a probate guardian, and for a while he had also a guardian *ad litem*. The plaintiff acted independently of the guardian *ad litem*, and, if we are to consider facts which appear in *Elder* v. *Adams*, 180 Mass. 303, to which the plaintiff referred in his testimony, it would seem that, during a part of the time, he acted adversely to this guardian. The plaintiff testified that the probate guardian, who is the grandmother of the defendant, employed him for herself, and for her son Reginald Adams of whom she was guardian, and who became twenty-one years of age about that time and employed the plaintiff for himself, and that he was acting generally for different members of the family and representing the whole family; but he did not recall any conversation or instructions in regard to the defendant. The presiding justice rightly found that the probate guardian made no contract to bind herself, or the ward's estate, for services to the ward. The plaintiff is therefore in the position of a volunteer, acting at the suggestion of relatives of the defendant. In such cases, ordinarily, there can be no recovery. *Jones* v. *Woods*, 76 Penn. St. 408. *Westmoreland* v. *Martin*, 24 S. C. 238.

In the aspect of the case most favorable to the plaintiff, he has no standing unless the services were necessaries. The plaintiff's testimony was the only evidence introduced at the trial, and we are of opinion that there is nothing in it which warrants the finding in his favor. The services were rendered in connection with the settlement of an estate, in which the defendant's only interest was as a legatee who would receive a not very large sum if the will should be allowed, or as a descendant of his grandfather who would take as an heir at law if the will should be set aside. Protection of such an interest of a minor

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does not come within the term "necessaries," as used in reference to the liability of minors. Ordinary rights of property are to be protected by a guardian, and not left to the care of the minor himself, or to the irresponsible action of third persons. R. L. c. 145, § 25. When proceedings affecting the minor as a party are going on in a court, a guardian *ad litem* is appointed. R. L. c. 145, § 23. A judgment against a minor, without a probate guardian or a guardian *ad litem* to represent him, is voidable upon a writ of error. *Johnson* v. *Waterhouse*, 152 Mass. 585.

We can conceive of conditions such that a minor may be bound to pay a reasonable compensation for the services of an attorney, on the ground that they were necessary; but ordinarily this liability is limited to cases where the services are rendered in connection with the minor's personal relief, protection or liberty. The cases of *Crafts* v. *Carr*, 24 R. I. 397, *Barker* v. *Hibbard*, 54 N. H. 539, *Munson* v. *Washband*, 31 Conn. 303, and *Askey* v. *Williams*, 74 Tex. 294, are illustrations of the application of this rule. In the first the services were rendered in an action, brought by the next friend of a female minor, to recover for an indecent assault upon her. In the second the plaintiff had been employed to defend the defendant upon a charge of being the father of a bastard. In the third the defendant had been seduced, and afterwards had been turned out of doors by her father, and the plaintiff had brought an action for the defendant against the seducer. In the fourth the services were rendered in defending a minor upon an indictment for stealing. These cases recognize the general doctrine that legal services rendered to a minor in regard to ordinary rights of property are not necessaries. See also as to this last proposition, *Phelps* v. *Worcester*, 11 N. H. 51; *Thrall* v. *Wright*, 38 Vt. 494; *Conant* v. *Burnham*, 133 Mass. 193; *Tupper* v. *Cadwell*, 12 Met. 559, 562.

With the protection which the law gives minors in regard to their property, through its provisions for the appointment of guardians, it cannot be held that services of an attorney, without employment by a guardian, are necessary to a minor in the settlement of the estate of a deceased person in which he is interested.

Exceptions sustained.

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JAMES McCHRISTAL *vs.* CLARENCE E. CLISBEE.

Suffolk. November 15, 1905. — January 3, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Bankruptcy. Practice, Civil, Verdict. *Judgment. Words,* "Wilful and malicious."

Where a discharge in bankruptcy is set up as a bar to an execution, and it appears from the record that the judgment on which the execution issued was entered upon a general verdict on a declaration containing several counts, one of which stated a cause of action that would be released by a discharge in bankruptcy while the other counts did not, *whether* evidence might not be received of the proceedings at the trial to determine, if possible, on which count the verdict was rendered, *quære.*

In the provisions of the bankruptcy act of 1898, § 17, cl. 2, excepting from release by a discharge in bankruptcy liabilities "for wilful and malicious injuries to the person or property of another" the words "wilful and malicious" have their ordinary legal meaning describing an intentional disregard of duty.

An execution issued on a judgment entered upon a general verdict, which found the defendant liable on a declaration containing a count for assault and battery, a count for false imprisonment and a count for malicious prosecution, is not barred by a discharge under the bankruptcy act of 1898, as all of these liabilities are excepted from the operation of a discharge in bankruptcy by § 17, cl. 2, of the act.

CONTRACT against a surety upon a poor debtor's recognizance, as stated in the opinion. Writ dated September 26, 1902.

At the trial in the Superior Court before *Fox*, J. it appeared that there was a breach of the recognizance, that the execution on which the poor debtor was arrested issued on a judgment in an action brought by the plaintiff described in the second paragraph of the opinion, that on January 30, 1901, after the recovery of this judgment against him and before his arrest, the poor debtor was discharged in bankruptcy under the bankruptcy act of 1898, that the judgment debt was scheduled in the bankruptcy proceedings, and that the plaintiff although he had due notice of the proceedings did not prove his claim.

At the close of the evidence the judge ordered a verdict for the plaintiff; and the defendant alleged exceptions.

S. R. Cutler, for the defendant.

C. F. Smith, for the plaintiff.

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KNOWLTON, C. J. This is an action against a surety upon a recognizance given by a debtor arrested on execution. The condition of the recognizance is to deliver himself up for examination before a magistrate, within thirty days of the arrest. There was a breach of the recognizance, and the only defence relied upon is, that the judgment upon which the execution was issued was rendered unenforceable by a discharge in bankruptcy granted to the debtor before the arrest.

The declaration in the action in which the judgment was rendered contained three counts, in the common form, one for an assault and battery, one for false imprisonment, and one for a malicious prosecution. There was a general verdict for the plaintiff and judgment was entered on the verdict.

The judgment is conclusive upon the debtor as to the facts necessarily involved in the verdict. Under our practice, where a general verdict for a plaintiff is returned upon a declaration containing several counts, instead of a separate verdict on each count, it is impossible to tell from the record upon which of the counts the finding is made, or whether it is made upon all of them. If one of the counts is for a cause of action that would be released by a discharge in bankruptcy, it may be that evidence might be received of the proceedings at the trial, in order to determine, if possible, on which count the verdict was rendered. But if all of the counts are for liabilities which are not affected by a discharge in bankruptcy, there is no occasion for such an inquiry.

The offer of the defendant in this case to show that, in all the matters referred to in the declaration in the original action, the debtor acted in good faith and without express malice, was rightly refused. It was not open to him to contradict the record, and it is immaterial on which count the verdict was found, or whether it was found on all the counts; for each of them alleges a wilful and malicious injury to the person of the plaintiff. Judgments in actions for wilful and malicious injuries to the person or property of another are excepted from the provable debts from which a bankrupt is released by a discharge. U. S. St. 1898, c. 541, § 17. There cannot be an assault and battery, or a false imprisonment, or a malicious prosecution, without a wilful injury of the person upon whom the wrong is

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inflicted. The word "wilful" in the statute means nothing more than intentional.

The defendant contends that the word "malicious" is not used here in its ordinary legal sense, and that it means a wicked, malevolent desire to do another an injury for the sake of the suffering that it will cause him. Such a feeling is commonly called express malice, while the malice here intended is nothing more than that disregard of duty which is involved in the intentional doing of a wilful act to the injury of another. Each of the wrongs charged in the different counts of the declaration is malicious in law.

The meaning of the statute in question has been considered by different courts, and interpreted in accordance with the views above stated. In *Leicester* v. *Hoadley*, 66 Kans. 172, (9 Am. Bankr. Rep. 318,) a judgment for damages for alienating the affections of the plaintiff's husband was held to be unaffected by a discharge in bankruptcy. In *In re Maples*, 105 Fed. Rep. 919, the judgment under a local statute was for damages for the seduction of the female plaintiff, and it remained in force notwithstanding the discharge of the defendant in bankruptcy. The judgment in *In re Freche*, 109 Fed. Rep. 620, was in favor of a father for the seduction of his daughter. *Distler* v. *McCauley*, 6 Am. Bankr. Rep. 491, was an action upon a judgment for damages for a breach of promise of marriage, accompanied by seduction and the birth of a child. In all of these cases it was held that the judgment was for a wilful and malicious injury to the person of another, and was within the exception in the statute. In *McDonald* v. *Brown*, 23 R. I. 546, it was held that a bankrupt was not released by his discharge in bankruptcy from a judgment giving damages for a libel, and in *In re Colaluca*, 133 Fed. Rep. 255, a judgment for an assault and battery was decided to be within the exception. The case of *Colwell* v. *Tinker* was decided first by the Supreme Court and afterward by the Court of Appeals in New York, and then by the Supreme Court of the United States. *Colwell* v. *Tinker*, 6 Am. Bankr. Rep. 434; 169 N. Y. 531; 193 U. S. 473. The judgment was for damages to a husband for criminal conversation with his wife. It was decided by all the courts that such a judgment was not affected by a discharge of the defendant in bankruptcy, and the statute

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was carefully considered by the Supreme Court of the United States, and given a construction adverse to the positions taken by the defendant in the present case.

Giving the language of the statute its natural meaning, and applying the rules stated in the cases referred to, it seems plain that, whether the judgment in the present case was founded upon an assault and battery, a false imprisonment or a malicious prosecution, it remains in full force, notwithstanding the debtor's discharge in bankruptcy.

Exceptions overruled.

EDMUND A. McDONALD *vs.* UNION FREIGHT RAILROAD COMPANY.

Suffolk. November 16, 1905. — January 3, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Tax, Excise. *Union Freight Railroad Company. Street Railway.*

The provision in the charter of the Union Freight Railroad Company, St. 1872, c. 342, § 1, that that corporation, which since 1874 has used nothing but steam as its motive power, "shall have all the powers and privileges and be subject to all the duties, restrictions and liabilities set forth in all general laws which now are or hereafter may be in force relating to street railway corporations, and to other railroad corporations, so far as the same may be applicable," makes that corporation subject to the excise tax imposed on street railway companies by R. L. c. 14, §§ 44–46.

KNOWLTON, C. J. The only question in this case is whether the defendant corporation is subject to an excise tax under the R. L. c. 14, §§ 44–46, which impose such a tax upon the earnings of street railway corporations. The defendant is not strictly a street railway company, within the statutory definition found in R. L. c. 111, § 1, for this definition includes only railroads or railways operated by motive power other than steam. The defendant's charter, (St. 1872, c. 342,) while giving it authority to use all kinds of power employed by street railways, provides that "the cars on said road may be drawn during the night by steam power, subject to the regulation of said board of aldermen." Since 1874 the corporation has used nothing but steam as its

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motive power, but in nearly all other respects it is like street railways. Section 1 of the charter provides that "said corporation shall have all the powers and privileges and be subject to all the duties, restrictions and liabilities set forth in all general laws which now are or hereafter may be in force relating to street railway corporations, and to other railroad corporations, so far as the same may be applicable." In *Boston* v. *Union Freight Railroad*, 181 Mass. 205, the various statutes showing its history and character, and particularly its resemblance to street railways, were considered at length, and it was pointed out that the legislation touching the repair of streets by street railway companies was equally applicable to this corporation. The fact that "other railroad corporations" are not liable to the payment of an excise tax upon earnings is not a sufficient reason for holding that this corporation should not pay such a tax, especially since it has been relieved from the care of streets by the same law that relieves street railways from such care. *Boston* v. *Union Freight Railroad, ubi supra.* The fact that the tax, when paid, is differently applied from the tax on street railway companies is not a sufficient reason for holding that it should not be imposed. See R. L. c. 14, § 61.

As the payment of such a tax is one of the duties and liabilities of street railway companies, and as there is no good reason why the statute requiring it should not be applicable to the defendant, we are of opinion that the tax was properly imposed, under the provision of the charter which we already have quoted.

Judgment for the plaintiff.

T. M. Babson, for the plaintiff.

C. F. Choate, Jr., J. L. Hall & R. A. Stewart, for the defendant, submitted a brief.

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ARTHUR D. FLANSBERG *vs.* HEYWOOD BROTHERS AND WAKEFIELD COMPANY.

Suffolk. November 16, 17, 1905. — January 3, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Negligence.

In an action by a freight brakeman against a manufacturer of articles made from rattan for injuries from being crushed between a pile of rattan near a branch track in the defendant's yard and a moving car on the side of which was the plaintiff, it appeared that the yard continuously was in a much crowded condition and that it was a custom to pile rattan in the spaces between the buildings wherever a vacant space could be found, that the pile of rattan with which the plaintiff came in collision was beside a brick building which was just beyond it and nearer the track, that the plaintiff had been a freight brakeman for a year and a half and had switched cars in this yard almost daily for about six months before he was injured, that the car upon which he was injured was of unusual width, that it frequently came in contact with buildings beside the track in the yard and when it tipped sometimes had touched the brick building mentioned above, that he knew all of these facts, as well as the fact that rattan sometimes was piled where he was injured, that when he was injured the car was moving at the rate of about four miles an hour, that he either was ascending the ladder at the side of the car or had his foot in the stirrup, and was not facing or looking in the direction in which the car was going. *Held*, that there was no evidence that the plaintiff was in the exercise of due care.

TORT for personal injuries as stated in the opinion. Writ dated June 4, 1901.

At the trial in the Superior Court before *Hitchcock*, J. the defendant asked the judge to rule: "1. Upon all the evidence in this case the plaintiff is not entitled to recover against the defendant. 2. The danger from the usual crowded condition of a freight yard from its being inadequate for the business there transacted is a risk which a freight brakeman working there assumes. Upon the evidence in this case the plaintiff is not entitled to recover."

The judge refused to rule as requested, and submitted the case to the jury, who returned a verdict for the plaintiff in the sum of $5,500. The defendant alleged exceptions.

G. F. Piper, for the defendant.

A. H. Russell, for the plaintiff.

KNOWLTON, C. J. The plaintiff, a brakeman employed by

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the Boston and Maine Railroad, was injured by being crushed between the side of a moving car and a pile of rattan, placed by the defendant company near the track on which the car was moving. A branch track extended from the main track of the railroad company into the yard of the defendant. In the yard the track branched in various directions, along the sides of buildings used as storehouses, leaving open spaces at various points in the yard. The grounds of the defendant covered several acres surrounded by a high fence, and were in part covered with buildings used for storage, and for the manufacture of goods from reeds and rattan. The part of the yard where the tracks were located was used for the reception and delivery of freight on cars owned and operated by the railroad company. The freight was loaded and unloaded by the employees of the defendant, and the cars were placed in position and taken away by the railroad company.

The train which served the defendant company was known as the Salem freight, and it switched into the yard of the defendant at least once a day, and sometimes oftener, either delivering loaded cars, placing empty cars in position for the reception of freight, or hauling away cars which had been loaded. While in the yard the train switched up and down several tracks, as the business required.

On the right of track one, as you entered the yard, was a scale house, and at a little distance from the entrance, on the same side, was a wooden building with a porch, and then an area extending along the track between buildings, a distance of about thirty feet, and then a brick building standing nearer to the track than the wooden building. On the day of the accident there was a quantity of rattan piled like cord wood along the line of the track, at one side of it, between the wooden building and the brick building, the bundles being laid regularly in the pile with their bent ends toward the track. The face of the pile at the corner of the brick building was at the same distance from the track as the building itself, and it gradually receded from the track as it extended towards the wooden building.

On the day of the accident a big broad furniture car was being pushed by the engine up track one, from the switch at the scale

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house, near the entrance to the yard, and the plaintiff, while riding upon it on the right hand side, with his foot in the stirrup, or on a ladder at the side of the car, came in contact with the pile of rattan and was injured.

The plaintiff had been employed by the railroad company as a brakeman a year and a half, and he had been on the Salem freight train for a period of about six months before the accident. During this time he had been accustomed to go about on the tracks in the defendant's yard, switching cars daily. He testified that, because of the illness of the brakeman who acted as flagman, he had acted as flagman most of the time for three or four weeks before the accident, and his duties then kept him out of the yard most of the time. At the previous trial he had testified that, for five or six weeks before the accident, he was down the track on which he was hurt once or twice a week.

The uncontradicted evidence from a large number of witnesses, those called by the plaintiff as well as those called by the defendant, was that the defendant's freight yard was much crowded, and that it was a custom to pile rattan in the spaces between the buildings, and wherever a vacant space could be found. One Wiley, a witness called by the plaintiff, said, "The rattan is all over the yard. They store it, use the whole yard more or less on each side of the track for sorting. They move it about on a hand-car. . . . When the defendant company is receiving cargo it is a usual experience to find rattan in the place in question." The conductor of the train, called by the plaintiff, testified that "the rattan is changed about from time to time in the yard; that he had seen rattan stacked in the place where it was the morning that Flansberg was hurt, as it was handy to the door; that he could not say how long the rattan had been in that particular space at this time; that the piles changed as they shifted them about, either using a hand-car or carrying it about." On re-cross-examination he testified that he thought the rattan had been in the narrow space between the brick building and the wooden building three or four weeks, but he could not state that it had been in the same substantial condition. The fireman, who was running the engine in the place of the engineer at the time of the accident, and was called as a witness by the plaintiff, testified "that the Salem freight shifted into the yard of the

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defendant every day, sometimes twice a day; . . . that he had seen rattan piled most everywhere in the yard; that he had seen rattan in the space between the brick and wooden buildings; that the space was used to store rattan, he supposed; that he noticed there was a pile there, but could not say how long it had been there — it might have been three weeks or a month; that he did not particularly observe it, but he knew the place was there and knew there was rattan there." One Stout, a witness called by the plaintiff, testified in regard to the disposition of the freight, "Rattan is piled in the space between the brick and the wooden building. . . . It is a usual experience to find rattan anywhere over these tracks." Referring to the space between the brick and the wooden building, he said, "This space is not very often vacant. . . . It would be the exception when rattan is not there in some shape." He also testified to the generally crowded condition of the yard. Similar testimony was given by numerous witnesses called by the defendant.

This evidence was entirely uncontradicted, except by the testimony of Grimes, who had been the flagman on this train, and whose duties did not ordinarily take him into the yard. He said he had not seen rattan piled at this place before the accident, but he said, "There was a crowded condition of things, a pretty close place — it runs to a point. That he had seen rattan three or four feet high and might be more." The plaintiff himself also said he had not seen rattan piled in that place before the day of the accident, but he testified that he had seen it in places between the tracks, a couple of feet high. He said: "I have never seen in that yard a pile of rattan high enough to rake me off of the position in which I was on that car or near enough to the track to do it." "I was familiar with that freight yard, with the buildings and with the location of the tracks. . . . It is rather contracted."

With nothing but the negative statement of the two witnesses that they had not seen rattan at this particular place, and with no contradiction of the testimony introduced by both parties as to the character and general mode of use of the yard, we come to the particulars of the accident. The brick building which the plaintiff was about to pass on the car was only three feet and six inches from the track. The plaintiff testified that the

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car on which he was riding was "one of the broadest cars used for freight purposes," he had heard "that it was nine feet six and one-half inches." He further said: "When passing the scale house, the big car was off the centre; that is, it will tip one way or the other, and when she leaned over toward the scale house, the roof of the car caught the roof of the scale house and scraped. The scale house was quite close to the track. All that I know is that it scraped the edge of the shingles of the scale house. . . . The conductor of the freight train remarked to me when we were down on track two or three, 'That is an extra wide car,' and I think I said, 'Yes, it scraped the shingles of the scale house.' . . . I knew the brick building was very close to the track, three and a half or four feet. I knew the location." He knew that there was not space enough for the body of a man between the building and the car as it would pass on the track. Indeed, there was testimony that when the car had tipped, it had sometimes touched the brick building. The switch at the scale house was one hundred and eighty-two feet from the brick building. According to the plaintiff's own testimony, which was undisputed in this particular, he stepped upon the stirrup of the car on the right hand side, and rode with his face toward the locomotive that was pushing the car, and without looking forward, until he came in contact with the rattan near the brick building. He testified that he was climbing the ladder, but did not reach the top of the car before the accident. According to some of the witnesses, he was standing on the stirrup, with his body swinging out, until he struck the pile. He testified, without contradiction, that the car was moving at the rate of about four miles an hour. Before he got upon the car, and all the time he was on it, the pile of rattan was very near him and in plain sight. If he had looked about when he was moving on the ground, before getting on the car, he would have seen the pile. If he had looked afterward, as he was riding, he could not have failed to see it. He easily could have stepped from the car at any time, as it was moving very slowly. He had been warned of the width of the car by the remark of the conductor, as well as by his own observation. The danger of riding on the side of such a car, in a yard generally so crowded with rattan, often piled upon the ground, and with buildings very

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near the track, called for great care, even if the plaintiff had not seen the pile which he afterwards encountered. In view of the conditions which the plaintiff knew, or would have known if he had exercised due care, we are of opinion that nothing appears in the evidence which justified him in riding on the side of this car without looking forward in time to see if there were obstructions with which he might come in contact. There was no evidence that he was in the exercise of due care.

Exceptions sustained.

JOHN R. WIDGER *vs.* ALICE A. BAXTER & another.

Suffolk. November 21, 1905. — January 3, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Bills and Notes. Contract, Consideration. *Husband and Wife.*

A note given in renewal of previous notes which were without consideration is without consideration.

A note signed by a husband and wife given to a former creditor of the husband, whose claim has been barred by a discharge of the husband in insolvency, merely as an acknowledgment of or security for an unenforceable moral obligation of the husband, is without consideration as against the wife.

The note of a wife given to a creditor of her husband as security for a pre-existing debt of the husband is not binding without a new consideration.

KNOWLTON, C. J. This is an action upon a promissory note, signed by the defendants Alice A. Baxter and Isaac E. Baxter, who are husband and wife. The chief justice of the Superior Court, before whom the case was tried without a jury, found that the note was given in renewal of eight notes, seven of which were for $200 each and one for some additional amount, made by the defendant Alice in 1893. He found that these notes were without consideration, and that the note in suit was therefore without consideration. See *Holden* v. *Cosgrove*, 12 Gray, 216. The case is before us on the plaintiff's exceptions, after a finding for the defendants.

The circumstances under which the eight notes were given were as follows: The husband, Isaac E. Baxter, went into insolvency in 1890, and John W. McMahon, to whom the notes

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were afterwards given, proved a claim of more than $2,000 against the estate. In 1891, with the assent of McMahon, a discharge in insolvency was granted to Baxter. Afterwards Baxter made some voluntary payments on this indebtedness proved by McMahon. In 1893 Alice, his wife, signed these eight notes, which McMahon had requested Baxter to get from her. The amount of them was what all parties thought was the moral indebtedness of Baxter to McMahon at that time. Afterwards, from time to time until December 4, 1899, Baxter made various payments to McMahon, so that there remained unpaid at this date $1,420, including interest. At McMahon's request the note in suit and another note of $500 were given to take up the six notes then outstanding of the original eight, and these notes were received by Baxter and his wife in exchange for the two then executed. The judge refused to rule, as requested by the plaintiff, that there was a consideration for the eight notes signed by the defendant Alice.

There is no indication that there was anything of benefit to her in the transaction, nor does it appear that McMahon gave up anything of value as a consideration for the notes. He had at the time an unsecured, unenforceable debt, against her husband, which had been discharged in insolvency, and was worthless, except as it might furnish a consideration for a promise that would bind the husband if he should choose to waive the benefit of his discharge, and make an unequivocal new promise to pay the debt. *Champion* v. *Buckingham*, 165 Mass. 76, and cases cited. *Way* v. *Sperry*, 6 Cush. 238. *Bigelow* v. *Norris*, 139 Mass. 12. It does not appear that the parties treated it as anything more than a mere moral obligation of Baxter. It is plain that such an obligation is not a sufficient consideration to support a promise of a third person to discharge it. *Mills* v. *Wyman*, 8 Pick. 207. *Valentine* v. *Foster*, 1 Met. 520. If it was treated as a debt, the evidence does not show that the notes were received in payment of it. The conduct of the parties is quite as consistent with a finding that the notes were received as a kind of security, to strengthen the purpose of the husband to meet his moral obligation. He had previously made payments which he was under no legal obligation to make, and for nearly six years afterwards he continued to pay, as if the matter were his and

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not his wife's, while she paid nothing. We must assume that the judge did not find that the debt was paid by the notes so that it could not afterwards be made a foundation for a valid new promise by the insolvent, if he chose to make one. The first request for instructions was rightly refused.

The second request was, that a wife's note, given in payment or as security for her husband's debt, is on valid consideration. This was too broad. A wife's note, given to a third person in payment of her husband's debt, is for a valuable consideration; but a note given as security for such a debt, previously existing, is not. To make a note of the latter kind valid there must be a new consideration. In the case supposed, the wife obtains nothing and the husband's creditor gives up nothing, and there is no consideration moving from either party to the other. *Green* v. *Shepherd*, 5 Allen, 589. *Courtney* v. *Doyle*, 10 Allen, 122. *Mecorney* v. *Stanley*, 8 Cush. 85. *Ellis* v. *Clark*, 110 Mass. 389. The finding of the judge that there was no consideration for the original eight notes, and that the note in suit was given in renewal of them, makes it unnecessary to consider other exceptions taken by the plaintiff.

Exceptions overruled.

J. E. Hannigan & W. Wilson, for the plaintiff.

S. H. Tyng & J. G. Holt, for the defendants.

ARTHUR C. SPOONER, administrator, *vs.* OLD COLONY STREET RAILWAY COMPANY.

Bristol. October 25, 1905. — January 4, 1906.

Present: KNOWLTON, C. J., MORTON, LATHROP, HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Negligence. Street Railway.

Gross negligence of the servants of a corporation operating a railroad or a street railway, which under R. L. c. 111, § 267, makes the corporation liable for the death of a passenger caused by such negligence, is shown by proof of a reckless and wilful disregard of consequences in the conduct of such servants.

In an action under R. L. c. 111, § 267, against a street railway company for causing the death of the plaintiff's intestate, while a passenger on a car of the

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defendant, it appeared that the plaintiff, a man seventy-three years of age, was seated on the last seat of an open car and facing the rear of the car, that his legs were crossed below the knees and his arms folded, that the conductor and the motorman in charge of the car had observed him in that position and had noticed that he seemed somewhat exhausted, that as the car was passing around a curve he was thrown out and received injuries from which he died, and there was evidence that this was due to the rapid swaying of the car. There was evidence warranting a finding that as the car approached the curve it was running to make up time and its velocity was greater than its customary speed of eighteen miles an hour, while a reduction of speed to five or six miles an hour was reasonably proper when entering upon and going around the curve. *Held*, that there was evidence warranting the jury in finding that gross negligence of the servants of the defendant caused the death of the plaintiff's intestate.

TORT under R. L. c. 111, § 267, for causing the death of the plaintiff's intestate, Philip H. King, a retired hackman, alleged to have been thrown from an open car of the defendant in which he was a passenger as it was running around a curve about five or six miles north of New Bedford in June, 1902. Writ dated October 20, 1902.

At the trial in the Superior Court before *Lawton*, J. it appeared that the plaintiff's intestate died a few minutes after striking the ground; that he was seventy-three years of age; that he was about five feet tall, weighing about one hundred and eighty-five pounds, with a large stomach and short legs; that at the time of the accident when the car rounded the curve he was sitting on the extreme rear seat within a foot of the end of the car, facing in the opposite direction from that in which the car was going, with his legs crossed below the knees and his arms folded and his coat and umbrella upon the seat beside him; that no one saw him fall, but the conductor saw him after he was out of the car and just before he struck the ground, and a passenger on the car heard him shout as he fell. The material evidence is described in the opinion of the court.

At the close of the evidence the defendant asked the judge to rule that upon all the evidence the plaintiff could not recover, and that there was no evidence in the case to show gross negligence on the part of the agents or servants of the defendant. The judge refused to give these rulings and submitted the case to the jury.

The jury returned a verdict for the plaintiff in the sum of $1,000; and the defendant alleged exceptions.

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The case was argued at the bar in October, 1905, before *Knowlton*, C. J., *Lathrop*, *Loring*, *Braley*, & *Sheldon*, JJ., and afterwards was submitted on briefs to all the justices.

F. S. Hall, for the defendant.

J. B. Tracy, for the plaintiff.

BRALEY, J. By the provisions of the St. of 1886, c. 140, now R. L. c. 111, § 267, if the life of a passenger is lost "by reason of the negligence or carelessness of a corporation operating a street railway, or of the unfitness or gross negligence or carelessness of its servants or agents, while engaged in its business," his personal representatives may recover damages for the use of the widow or children, to be assessed within a minimum and maximum limit according to the degree of culpability. *Holland* v. *Lynn & Boston Railroad*, 144 Mass. 425.

When the plaintiff's intestate became a passenger, the defendant engaged to provide proper facilities of transportation, including competent servants, and to carry him safely over its route to where at the end of the transit he would leave the car.

In occupying the seat which faced the fender at the rear, and in taking the position which he assumed after seating himself, the intestate did nothing unusual, or that could be found to have been inconsistent with ordinary prudence. The car was an open one provided for the accommodation of passengers, who by this arrangement were invited by the company to choose and use this seat among others, and the intestate, having been invited and permitted to use it, had the right to assume that it was suitable for him to occupy, and that he could ride there in safety while being transported.

It is a matter of common knowledge that either from inequalities of surface, or necessary curves in the construction of the roadbed, the cars of a railroad operated by steam or of a street railway may in passing over the track occasionally jolt or lurch without this motion being caused by a defect in the track or in the car. Whenever this occurs, though it may be disturbing and annoying, yet it is considered as fairly incidental to the mode of travel, and must be held to have been contemplated by the passenger. *Stewart* v. *Boston & Providence Railroad*, 146 Mass. 605. *Holland* v. *West End Street Railway*, 155 Mass. 387.

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McCauley v. *Springfield Street Railway*, 169 Mass. 301. *Byron* v. *Lynn & Boston Railroad*, 177 Mass. 303.

Inasmuch as there is no evidence that the roadbed was not properly constructed, or the car suitably equipped, or managed by competent employees, the plaintiff fails to show any act of negligence by the defendant under the statute, and if this also is true of the conduct of the motorman and the conductor the verdict must be set aside.

Upon taking his seat, the intestate sat with his legs crossed below the knees, and his arms folded. While in this position he was observed by the motorman and conductor, the latter especially noticing that he "seemed quite exhausted." From this evidence the jury could find that both knew he was on the rear seat in the situation described.

By reason of his weight and the distance from the outer rail of the track where his body was found, they further could have found that his ejection was due to the rapid swaying of the car. See *Evensen* v. *Lexington & Boston Street Railway*, 187 Mass. 77.

But ordinary carelessness by either the conductor or motorman, which if the intestate had survived would have been sufficient to support an action against the defendant, is not gross negligence for which the company is liable. Before taking up the evidence for the purpose of determining this question it may be well to refer to the meaning of the statutory term "gross negligence."

We have uniformly held that while something more than a mere want of common prudence is intended and must be proved, yet the difference is one of degree, and when a reckless or wilful disregard of consequences is manifest such conduct is evidence of great or gross negligence. *Galbraith* v. *West End Street Railway*, 165 Mass. 572, 579, 581, and cases there cited. *Emery* v. *Boston & Maine Railroad*, 173 Mass. 136, 139. *Banks* v. *Braman*, 188 Mass. 367.

The route of the car was about nine miles, over which it was expected to pass in thirty minutes, and with the usual delays to take on and leave passengers the average speed was eighteen miles an hour.

The witnesses differed as to the rate around the curve, those

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for the plaintiff estimating it to be from twelve to fifteen miles an hour or more, while the motorman and the conductor fixed it at from five to six miles. Accompanying their testimony was the evidence of the defendant's experts that a car moving from twelve to fifteen miles an hour would smoothly and safely pass over the curve, and if this testimony stopped at this point it would be evident that proof of recklessness by either of the defendant's employees was lacking. But when the conductor saw the body of the deceased passing through the air from the car to the ground he gave the usual signal to stop, and in a few seconds rang the emergency bell, and although the brake was immediately applied at a point about thirty to thirty-five feet from where the intestate fell, the car, with the brake set, ran over a dry rail about three hundred and sixty-five feet farther before it finally was stopped. Upon this conflicting evidence the jury could have found from the evidence of the conductor and the motorman that reducing the speed from eighteen to five or six miles when entering upon and in going around the curve indicated what rate in their judgment was reasonably proper.

Although the experts of the defendant were of opinion that if the car was moving from twelve to fifteen miles it would not take on an unusual or unsafe swaying motion, the weight to be given their evidence was for the jury in connection with the fact that if no greater rate of speed was employed than the maximum estimate given by them, the intestate would not have been subjected to an impetus by which he was instantly thrown from the car. But there was proof of a greater rate of speed even than that fixed by the experts as safe.

Two of the witnesses called by the plaintiff had observed the car as it passed them about a quarter of a mile distant from the scene of the accident, and according to the evidence of one it was twelve minutes late, and by the evidence of the other it was "going so fast" that he looked at his watch to ascertain the time.

Another witness, who was the only passenger besides the intestate, gave evidence that between the time the signal was given and the time the car stopped perhaps ten seconds elapsed. If his evidence was believed then within this period the car had

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moved a distance of at least three hundred and sixty-five feet, which would indicate that it was running slightly in excess of twenty miles an hour.

From the testimony of these witnesses an inference fairly could be drawn that as it approached the curve the car not only was running to make up time, but its velocity was greater than its customary speed of eighteen miles.

This view would be materially corroborated and strengthened by the further uncontroverted fact that upon application of the brake to a substantially empty car, and under such conditions that it must have effectually gripped the wheels, its momentum had become such that it continued under way for the distance already stated.

We are of opinion that it was open upon all the evidence for the jury to find that an old man plainly seen to be in somewhat feeble health had been accepted as a passenger, invited and permitted to take a seat in a place provided for this purpose, but which might become dangerous if an undue rate of speed was maintained in passing over this curve, and thereafter in reckless, or wilful, or wanton, disregard of these conditions, the car was so managed and controlled by those in charge as wrongfully to cause his death.

The defendant suggests that the present case should be governed by *Witherington* v. *Lynn & Boston Railroad*, 182 Mass. 596, but the facts are widely dissimilar. In that case the intestate fell from an open car while standing near the edge of the rear platform, and the track though curved was nearly straight. It is distinctly said in the opinion, "This is not a case where the speed was so great as to result in any unusual motion or jar of the car," and it also was held that there was no negligence on the part of the defendant in not warning the passenger of the obvious danger of standing close to the side of a rapidly moving car. Here it could be found that the deceased did not fall, but by the excessive force of the lateral motion was lifted bodily from his seat, and thrown out of the car.

In the opinion of a majority of the court the order must be,

Exceptions overruled.

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FRANK B. DOW *vs.* DENNIS A. LONG.

Middlesex. November 14, 1905. — January 4, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Libel and Slander. Words, "Robbing the taxpayers."

A publication in a newspaper charging the chairman of the board of police of a city with being the head of the "police rum combine," with furthering by unfair means and perhaps by bribery and for improper purposes the election of a certain candidate for superintendent of streets described as corrupt and the advocate of "all sorts of schemes to rob the taxpayers," may be found to be libellous, and the fact that the publication related to the superintendent of streets as a candidate for public office is no defence to an action by the chairman of the board of police who was not such a candidate.

A publication in a newspaper stating that the chairman of the board of police of a city is furthering the election of a certain candidate for superintendent of streets, that he "could not select in the entire city a person who is better adapted for the purpose of robbing the taxpayers," and that from the plaintiff's "standpoint he will make an ideal superintendent of streets," as set forth in the declaration in an action for libel brought by the chairman of the board of police, was held on demurrer to be libellous.

TORT for alleged libel in the publication of three different articles which appeared on May 29, 1904, in the same edition of the Lowell Sunday Telegram, a newspaper owned and published by the defendant. Writ dated June 1, 1904.

The first count contained among its allegations those which are referred to and described in the second and third paragraphs of the opinion and there are held to have been set out merely by way of inducement, including the publication headed "Send Crowley to City Farm," which is printed below as contained in the third count, and concluded by setting forth the following publication as libellous: "'It is understood that the Brewery placed $5,000 in the hands of the "boss" (meaning in the hands of the plaintiff) to be distributed judiciously for the election of "Smooth Bob."' (Meaning to be distributed by the plaintiff among members of the board of aldermen and common council of said Lowell to thereby secure votes for said Robert E. Crowley for the office of superintendent of streets, and that the plaintiff had committed the crime of bribery by giving money to one or more of the members of said board of aldermen to secure

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the election of said Robert E. Crowley by said board as aforesaid.)"

The publication alleged in the second count was as follows:

"'Frank B. Dow, (meaning the plaintiff) could not select in the entire city a person who is better adapted for the purpose of robbing the taxpayers than "Bob" Crowley. (Meaning said Robert E. Crowley.) From Dow's standpoint (meaning the plaintiff's standpoint) he will make an ideal superintendent of streets.' (Meaning that the plaintiff had used his influence to secure the election of a man who would rob the taxpayers as superintendent of streets, and that the plaintiff is a man lacking in integrity and honesty.)"

The publication alleged in the third count began with the heading: "Send Crowley to City Farm," and contained, with other matter, the following:

"If the concurrence of the common council in the election of Robert E. Crowley as superintendent of streets can be bullied or bought by the police-rum combine, it will be accomplished. Chairman Dow of the board of police is sending for democratic members of the common council and telling them they must vote for Crowley"; . . .

"Every time a scheme has been put forward to tap the city treasury Crowley has been at city hall working members of the city council for its passage — smooth-paving schemes, bridge schemes, bath-house schemes, land schemes, hospital schemes, all sorts of schemes to rob the taxpayers have had Crowley as their advocate. Armed with the power which goes with the office of superintendent of streets his ability to raid the treasury would be correspondingly increased and he would be a greater menace than ever to the public purse. If Crowley must be provided for at the public expense, it would be cheaper to send him to the city farm at once.

"The election of Crowley, as pointed out by the Telegram months ago, means the placing of additional power in the hands of the police-rum combine, at the head of which stands Frank B. Dow."

The defendant demurred to the declaration and set forth as causes of demurrer:

"First: For that there is not set forth in said declaration or

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in either count thereof that which is by its natural import libellous or that furnishes legal ground for an action for libel or is actionable on any ground.

"Second: For that the matter set out with the accompanying averments and innuendoes in either count thereof is not libellous as to the plaintiff nor does it appear that the matter set out relates to the plaintiff.

"Third: For that in Counts 1 and 3 of said declaration the alleged libellous matter that appears in the copies annexed thereto does not relate to the plaintiff."

The Superior Court sustained the demurrer, and gave judgment for the defendant. The plaintiff appealed.

N. D. Pratt, for the plaintiff.

J. J. Pickman, for the defendant.

SHELDON, J. The defendant argues that the first count of the plaintiff's declaration fails to state any cause of action because the alleged defamatory matter is not libellous, and because it is not averred that the alleged libels were published "concerning the plaintiff."

The first count is somewhat inartificially drawn; but in our opinion it sufficiently appears that the first articles averred therein to have been published are set out merely by way of inducement, and that the libel relied upon is contained in the short article appearing at the end of this count. With reference to the last cause of demurrer relied upon, the declaration expressly avers that this alleged libel is published "of and concerning the plaintiff" and his conduct in his office; and this is a sufficient averment that the publication was made of and concerning the plaintiff. *Young* v. *Cook*, 144 Mass. 38. *Hurley* v. *Fall River Daily Herald Publishing Co.* 138 Mass. 334. *Chenery* v. *Goodrich*, 98 Mass. 224. "When the words are alleged to be spoken of the plaintiff, no innuendoes are necessary to apply them." Devens, J. in *Young* v. *Cook*, *ubi supra*.

A more important question is whether the alleged publication is libellous when taken in connection with the previous averments of this count. These averments are in substance that the plaintiff was a member and chairman of the board of police of the city of Lowell; that one Robert E. Crowley was a candidate for the office of superintendent of streets of said city; that such

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superintendent was chosen by the concurrent vote of the board of aldermen and the common council; that said Crowley had been elected to said office on the part of the board of aldermen, and the question of his election was pending in the common council; that the defendant then published the article stated in the count and headed: "Send Crowley to City Farm," and the shorter articles which immediately follow it. The count then avers that the defendant published the alleged libel "of and concerning the plaintiff, and of and concerning his aforesaid office, and of and concerning his conduct in his said office, for the purpose of procuring his removal from said office, and with reference to the candidacy and election of said Robert E. Crowley to said office of superintendent of streets as aforesaid, and with reference to the articles aforesaid." The defendant does not argue that this alleged libel, construed in connection with the other publications averred, would not tend to subject the plaintiff to public ridicule and contempt and to injure seriously his reputation both as an individual and in his official capacity; and, unless the averments of the declaration show a sufficient occasion and justification for what the defendant is alleged to have done, this is enough to constitute a cause of action. *Lovejoy* v. *Whitcomb*, 174 Mass. 586. *Haynes* v. *Clinton Printing Co.* 169 Mass. 512. *Call* v. *Hayes*, 169 Mass. 586. *Twombly* v. *Monroe*, 136 Mass. 464. The defendant does not dispute this general principle, but rests his defence upon the ground that the declaration shows that the election of a superintendent of streets was pending in the city council of Lowell; that Robert E. Crowley was a candidate for this office; that the alleged libels were statements made in his newspaper with reference to that election, the fitness of Crowley for the office, and the action of the plaintiff in seeking to bring about Crowley's election; and he contends that the matters discussed by him were of public interest and general concern in Lowell, and so were protected and cannot be made the ground of action. And it is true that comments fairly made with reference to the action and attitude concerning public matters of a person seeking or holding public office are not to be treated as libellous. *Smith* v. *Higgins*, 16 Gray, 251. *Bodwell* v. *Osgood*, 3 Pick. 379. *Wason* v. *Walter*, L. R. 4 Q. B. 73, 93, 94. And doubtless a more difficult question would be raised if this action

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had been brought by Crowley for the statements made concerning him in these alleged publications, although it is to be observed that even in such a case, as is pointed out by Holmes, J. in *Burt* v. *Advertiser Newspaper Co.* 154 Mass. 238, 242, it is criticism and not statement that is protected, and if one takes upon himself to allege facts otherwise libellous, "he will not be privileged if those facts are not true." See the cases there cited, pp. 243, 244. But this action is not brought by Crowley. The declaration charges that the defendant, after statements which import that Crowley was utterly unfit for the office which he sought, that he had endeavored to further every scheme which had been put forward "to tap the city treasury," and that the plaintiff sought Crowley's election to increase his ability "to raid the treasury" and to put "additional power in the hands of the police-rum combine," at the head of which stood the plaintiff, and after making what a jury might find were charges that this "combine" and the plaintiff were seeking to procure Crowley's election by unfair means and perhaps by bribery, directly states that $5,000 had been placed in the hands of the plaintiff "to be distributed judiciously for the election" of Crowley. It seems manifest to us that, whatever might be the findings of a jury, it cannot be said as matter of law that this count does not set forth a cause of action.

The second count may be considered more briefly; for the decision upon it involves only the general principles already stated. It is doubtless manifest that the words "robbing the taxpayers" do not necessarily import a charge of felony. *Carter* v. *Andrews*, 16 Pick. 1. The words are to be construed as they would be naturally and ordinarily interpreted by the general reader. *Goodrich* v. *Davis*, 11 Met. 473, 481. The innuendo cannot extend the sense of the words beyond the natural import. *Goodrich* v. *Davis*, *ubi supra*. *McCallum* v. *Lambie*, 145 Mass. 234. *Brettun* v. *Anthony*, 103 Mass. 37. But this action is for libel, not slander, and it is immaterial whether or not participation in any criminal conduct is charged. *Atwill* v. *Mackintosh*, 120 Mass. 177. We think that the jury well might find that the defendant charged the plaintiff with being such a man that from his standpoint one who would unlawfully and improperly spend the public money was his ideal superintendent of streets, and that the plain-

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tiff supported Crowley because he was such a man; and we cannot say that this is not an actionable libel. *Haynes* v. *Clinton Printing Co.* 169 Mass. 512. *Bishop* v. *Journal Newspaper Co.* 168 Mass. 327. *Twombly* v. *Monroe*, 136 Mass. 464.

For the reasons already stated the demurrer must also be overruled as to the third count.

Accordingly the judgment of the Superior Court must be reversed and the demurrer overruled.

So ordered.

DAVID D. NYE *vs.* HOWARD L. SWIFT & another.

Barnstable. November 16, 1905. — January 4, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING & SHELDON, JJ.

Easement. Water Rights. Cranberry Bog.

A grant by deed of the right to raise the water of a pond fed by a stream for the purpose of flowing the cranberry bog of the grantee adjoining the stream above the pond does not give the grantee the right to use the pond and the bog of the grantor adjoining it as a reservoir to hold water to be used afterwards by the grantee in flowing his bog.

Although R. L. c. 196, § 39, provides that the provisions of that chapter, commonly called the mill act, shall apply, so far as applicable, to a dam erected and maintained across a stream to flow land for the cultivation and growth of the cranberry, this does not make a petition under § 4 of that chapter the sole or proper remedy of one whose cranberry bog adjoining a pond is injured by the owner of another bog, which adjoins the stream feeding the pond, from unlawfully storing water on the lower bog by means of dams.

TORT for unlawfully flowing the land of the plaintiff in the manner stated in the opinion. Writ dated August 14, 1896.

In the Superior Court the case was referred to George F. Tucker, Esquire, as auditor. Later the case was heard by *White*, J. upon the auditor's report which was the only evidence presented. The material facts shown by the report are stated in the opinion. The defendants asked the judge to rule that on those facts the action could not be maintained. The judge refused to make this ruling, and found for the plaintiff, assessing damages in the sum of $944.06. The defendants alleged exceptions.

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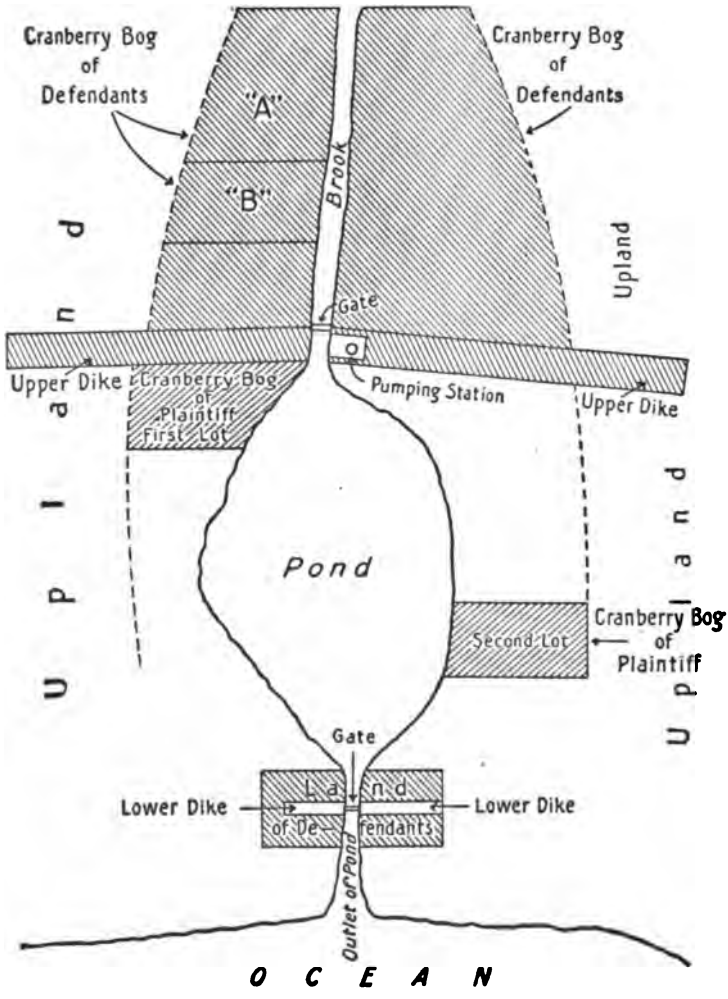
The following is a copy of a plan annexed to the auditor's report, which is referred to in the opinion:



H. P. Harriman, for the defendants.

J. H. Beale, Jr., for the plaintiff.

SHELDON, J. This is an action of tort brought to recover damages for the flowing of the plaintiff's land by the defendants. At the trial in the Superior Court, the only evidence offered was the report of an auditor; and the only question

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which comes before us is whether upon the facts stated in that report the action can be maintained.

It appears from the report that in 1895 the defendants owned cranberry bogs upon each side of a stream just above a pond into which the stream ran, and the plaintiff owned a bog immediately below one of the defendants' bogs situated on one side of the pond, and another bog on the other side of the pond and further down. Below both of the plaintiff's bogs, the water flowed from the pond through a narrow outlet into the ocean. The defendants' title to their bogs came partly through a warranty deed given by the plaintiff's father, which granted "the privilege of raising the pond below sufficient for flowing their bog when made," and partly through a warranty deed from the plaintiff which granted the privilege "to raise the water and flow their bog." Both of these deeds were given in 1881. The different bogs in question and the pond and stream are shown on the plan which was annexed to the auditor's report. The defendants' bogs are sixteen to eighteen inches higher than the plaintiff's bog.

In 1881 or 1882 the lower dike shown on the plan was erected across the outlet of the pond, on land now owned by the defendants; and it was admitted that the defendants had the right to flow their bogs by using this lower dike or dam, even though by such flowing the plaintiff's bog would be covered with water. It is necessary that cranberry bogs should be flowed in the spring or early summer to destroy insects called fire-worms, which unless destroyed are fatal to the growth of the cranberry. Until the early part of 1895 the defendants flowed their bogs by means of this lower dike or dam; but the defendants then erected the upper dike shown upon the plan, just above the plaintiff's first bog, and a pumping station upon the dike. Water was held upon the defendants' bog above this upper dike by means thereof until May 20, 1895, when the defendants pumped it by a steam pump into the pond below, so flowing the plaintiff's bog, where it was held by closing the gates at both dikes until June 7 next following, when the water was pumped back upon the defendants' bogs above the upper dike, and upon June 20 the defendants again pumped the water from their bogs above the upper dike into the pond below, and again pumped the water back upon the defendants' bogs on the twenty-third day of June, after

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which they opened the gates at both the upper and lower dikes and allowed the water to flow unobstructed into the sea. The effect of these operations, though highly beneficial to the defendants' bogs, was to do great injury to the plaintiff's bog, and the material question involved in the case is whether the defendants, having under their deeds the right to raise the water to flow their bogs, had the right to adopt this method of accomplishing that result.

It appeared that to raise the water sufficiently to flow the defendants' bog by using the lower dike alone without the aid of the steam pump and the upper dike, it would have been necessary to keep the water on the plaintiff's bog a longer time than it was kept there by the plan adopted, and that the place where the plaintiff's bog was constructed was a part of the bed of the pond at the time of the giving of the deeds by the plaintiff and his father in 1881, and had been drained and so had become available for growing cranberries in 1891 only by reason of the defendants having lowered the water of the pond by lowering the outlet at their lower dike. It also appeared that it is impossible to flow properly the defendants' bogs by means of the lower dike alone.

It will be observed that the plaintiff's complaint is not that the defendants have raised the water and flowed his bog for the purpose of flowing their bog; for this it is conceded that the defendants have the right to do. It is that the defendants, having raised the water upon their bogs, have then discharged it into the pond and held it there between the upper and lower dikes for some days, then pumped the water back from the pond upon their bogs and held it there, and so continued, practically treating the pond and the plaintiff's bog as a reservoir, and using the lower dike for the purpose, not of raising water to flow their own bogs, but of holding the water upon the plaintiff's bog for their future use. This is what the auditor has found that they have done; and we do not think it necessary to cite authorities to show that they have not the right to do this under the guise of raising the water to flow their own bogs.

It is a general rule that an action will lie against one who collects mere surface water into a definite artificial channel and discharges it upon his neighbor's land. *Fitzpatrick* v. *Welch*,

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174 Mass. 486. *Smith* v. *Faxon*, 156 Mass. 589. Doubtless indeed the defendants, after they had rightfully raised the water to flow their bogs, would not be under any liability to the plaintiff for allowing this water to escape by the stream, even though the natural flow of the stream might be thereby materially increased and some damage thereby caused to the plaintiff; but we do not see how this principle gives them any right, after having thus used the water, to impound it upon the plaintiff's premises for their own future use. We are of opinion that the defendants had no right to adopt this method of flowing the plaintiff's land. An easement granted for one purpose cannot at will of the dominant owner be converted into an easement for a different purpose. *Jennison* v. *Walker*, 11 Gray, 423. *Allan* v. *Gomme*, 11 Ad. & El. 759.

But the defendants contend that they had a right to erect and maintain these dams under the provisions of R. L. c. 196, § 39, and that no action can be maintained against them at common law for any damages occasioned thereby, because the sole remedy for the recovery of any such damages is by petition under § 4 of the same chapter. But this contention does not seem to us to be well founded. It is settled that the general provisions of c. 196 of the Revised Laws with reference to mills and mill dams are to be applied, so far as may be, to dams erected for cranberry culture. *Howes* v. *Grush*, 131 Mass. 207. *Blackwell* v. *Phinney*, 126 Mass. 458. *Hinckley* v. *Nickerson*, 117 Mass. 213. *Turner* v. *Nye*, 154 Mass. 579, 582. And it has been decided that these statutes are to be applied to continuous and descending streams of water, to the raising of a head of water either for the operation of a mill or for the creation of a pond. *Thompson* v. *Moore*, 2 Allen, 350. *Murdock* v. *Stickney*, 8 Cush. 113. For such injuries as are here complained of, an action at law seems to be the proper remedy. *Thompson* v. *Moore*, *ubi supra*. *Brigham* v. *Wheeler*, 12 Allen, 89. *Bates* v. *Weymouth Iron Co.* 8 Cush. 548. *Eames* v. *New England Worsted Co.* 11 Met. 570.

Nor is it material that if the defendants had flowed their bogs in the manner allowed by their deeds, the damage caused to the plaintiff might have been greater than that caused by their wrongful acts.

Accordingly, the entry must be

Exceptions overruled.

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COMMONWEALTH *vs.* WILLIAM W. BARTLETT & another.

Suffolk. November 20, 1905. — January 4, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Ship. Seamen. Enticing Crew of Vessel to desert.

Under U. S. Rev. Sts. §§ 4520, 4523, a seaman does not become a member of the crew of a vessel exceeding fifty tons burden which is bound from a port in this Commonwealth to a port in any other than an adjoining State until the shipping articles have been signed both by the master and himself, and no complaint under R. L. c. 66, § 2, will lie for enticing him away from the vessel before such signing.

COMPLAINT, received and sworn to on March 7, 1904, under R. L. c. 66, § 2, for enticing and assisting one Peter Nicoll, alleged to have been a member of the crew of the schooner Addie M. Lawrence, to leave and desert that vessel before the expiration of his term of service.

At the trial in the Superior Court before *Harris*, J. the defendants made a motion to quash and a motion to dismiss the complaint on the grounds, among others, that R. L. c. 66, § 2, is in violation of the Constitution of the United States which confers upon the courts of the United States admiralty and maritime jurisdiction and gives Congress the power to regulate commerce among the several States. U. S. Const. art. 3, § 2; art. 1, § 8. Both of the motions were denied.

At the trial it appeared that on the evening of February 5, 1904, the Addie M. Lawrence, a six-masted schooner exceeding fifty tons burden, was lying in Boston Harbor, and was to sail on a voyage to Norfolk and Newport News, Virginia, that on that evening Peter Nicoll, named in the complaint as one of the crew of the vessel, was on board performing duties which he had agreed to perform, and that he had made an oral contract with the captain of that vessel to perform duty as a seaman. Evidence was introduced tending to show that he had signed the shipping articles before the acts complained of, and the question of whether he had done so was left to the jury under instructions, to which the defendants excepted. It appeared that

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the captain had not signed the shipping articles at the time of the acts complained of. There was evidence tending to show that a full complement of men had been hired, some of whom were not on board but were to arrive on board in time for the vessel to sail on the following Saturday, the vessel herself being ready for sea. It was conceded by the Commonwealth that the captain had not signed the articles, as he was waiting to sign once for all, when all were finally on board.

The defendants contended, first, that Nicoll was not a member of the crew within the meaning of the statute, and, second, that the act was unconstitutional and conferred no jurisdiction on the court, and requested the judge to give, among other instructions, the following:

8. A person is not a "member of the crew" under this statute until the agreement of service is signed not only by himself, but by the captain of the vessel, as required by U. S. Rev. Sts. § 4520.

14. "Term of service" as used in this statute means a specific period of service, not a service at will.

15. If it appears that the agreement for service was not signed by the captain, and that the persons persuaded had entered on the duties of their employment, the service is merely at will, and the defendants must be acquitted.

20. R. L. c. 66, § 2, has no application to vessels engaged in interstate or foreign commerce, and if it appears that the vessels in question were bound for ports in some other State or country the defendants must be acquitted.

21. The case presented by the government is exclusively cognizable by the federal courts of admiralty and maritime jurisdiction, and this court has no jurisdiction thereof.

The judge refused to give these instructions, and left the case to the jury, who returned a verdict of guilty. The judge imposed a sentence of imprisonment for one month in the house of correction and a fine of $100 on each defendant, and granted a stay of execution, to await the further order of the court. The defendants alleged exceptions.

A. P. Gay, (*J. T. Keen* with him,) for the defendants.

F. H. Chase, First Assistant District Attorney, for the Commonwealth, submitted a brief.

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KNOWLTON, C. J. The defendants were complained of under R. L. c. 66, § 2, for enticing and persuading, and aiding and assisting a member of the crew of a vessel about to sail from the port of Boston, to leave and desert said vessel before the expiration of his term of service therein. It appeared at the trial that the vessel was about to sail to Norfolk, Virginia, and that Nicoll, the person alleged to have been enticed and persuaded, had made an oral contract with the captain to perform duty as a seaman. It was admitted by the Commonwealth that the captain had not signed the shipping articles at the time of the acts complained of, but there was evidence tending to show that Nicoll signed them, either before or after the alleged misdemeanor of the defendants. The judge instructed the jury that the fact that the shipping articles had not been signed by the captain would not relieve the defendants from liability, if the other material facts were proved, and that it was of no consequence whether Nicoll signed the articles before or after the acts of the defendants, if he previously had made an oral contract with the captain for service as a seaman on board the vessel.

In order to constitute an offence under the statute, the influence referred to must be exerted upon "a member of the crew of a vessel . . . before the expiration of his term of service therein." The person referred to must not only be a member of the crew, but he must be one who has entered upon a term of service which is to continue for some time in the future. Unless there is such a term during which the member of the crew is under a binding engagement to serve on the vessel, it is no offence to persuade or entice him to leave the vessel.

For the protection of seamen as well as shipowners, the statutes of the United States contain elaborate provisions regulating the making of contracts for service on shipboard. The U. S. Rev. Sts. § 4520 provides that the master of a vessel of the burden of fifty tons or upwards, bound from a port in one State to a port in any other than an adjoining State, shall, before he proceeds on such voyage, make an agreement in writing or in print with every seaman on board such vessel, declaring the voyage or term of time for which such seaman shall be shipped. Section 4523 declares that: "All shipments of seamen made

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contrary to the provisions of any act of Congress shall be void; and any seaman so shipped may leave the service at any time." Shipments of seamen without the signing of shipping articles are void, and the seaman may leave the vessel at any time. *The Pacific*, 23 Fed. Rep. 154. *The Lud Keefer*, 49 Fed. Rep. 650. *The City of Fremont*, 2 Biss. 415. If the shipping articles are not signed until after the vessel has left her port of departure, or if they do not declare the voyage with sufficient definiteness, or if wages are advanced to a seaman contrary to the act of Congress, the shipment is void, and the seaman may leave the service at any time. *The Occidental*, 101 Fed. Rep. 997. *Snow* v. *Wope*, 2 Curt. C. C. 301. *Kenney* v. *Blake*, 125 Fed. Rep. 672.

The shipment of a seaman becomes of binding effect upon the signing of the shipping articles. *Tucker* v. *Alexandroff*, 183 U. S. 424, 442, 444. *The Ida G. Farren*, 127 Fed. Rep. 766, 767. *Patterson* v. *Bark Eudora*, 190 U. S. 169, 175. Other sections of the Revised Statutes of the United States show that the shipping articles constitute the only binding contract for a term of service. Section 4521 provides that, "Any seaman who has not signed such a contract shall not be bound by the regulations nor subject to the penalties and forfeitures contained in this title." See also §§ 4511, 4523, 4612, and the form of articles of agreement, Table A, at the end of Title LIII.

These articles, to be binding, must be signed by both the master and the seaman. The form already referred to at the end of Title LIII. shows this. In reference to vessels of a different class from this, it is provided, in regard to articles signed before a shipping commissioner, that "every such agreement . . . shall be signed by the master before any seaman signs the same." Articles under § 4520 may be made before a shipping commissioner, although they are not required to be so made. U. S. St. June 19, 1886, c. 421, § 2; 24 U. S. Sts. at Large, 80. When so made they must be made in the same manner as those required to be made before a shipping commissioner, that is, they must be signed by the master before being signed by any seaman. In this case it appears that the master "was waiting to sign once for all, when all were finally on board." The articles, therefore, were not binding upon either party because they were not signed by the master. This is in accord-

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ance with the rule of law in regard to ordinary agreements in writing which are made to be executed by two parties mutually contracting with one another. *Goodenow* v. *Dunn*, 21 Maine, 86, 91. *Waggeman* v. *Bracken*, 52 Ill. 468. *Barber* v. *Burrows*, 51 Cal. 404. *Arnold* v. *Scharbauer*, 116 Fed. Rep. 492, 495. It follows that Nicoll was not a member of the crew who had entered upon a term of service, or who was bound to any term of service, at the time of the alleged acts of the defendants. He was at liberty to leave the ship at any time, inasmuch as he had made no binding contract. Upon the facts admitted by the Commonwealth, the defendants could not legally be convicted.

The defendants filed a motion to quash and a motion to dismiss, and took exceptions to orders overruling these motions. The questions arising under the motions, which relate principally to the constitutionality of R. L. c. 66, § 2, are properly before us on the exceptions. But inasmuch as, on the admitted facts, our decision upon the other questions will finally dispose of the case, we do not think it necessary to consider the constitutional questions.

Exceptions sustained.

AMERICAN WOOLEN COMPANY *vs.* BOSTON AND MAINE RAILROAD.

Suffolk. November 21, 1905. — January 4, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Witness, Cross-examination. *Practice, Civil*, Discretion of court.

In an action by a manufacturer against a railroad company for an alleged failure to deliver three car loads of coal entrusted to the defendant as a common carrier for delivery to the plaintiff as part of sixty-one car loads, where the plaintiff and the defendant rely respectively on records of the receipt and of the shipment and delivery of car loads of coal, the plaintiff's records not including the car loads in question and the defendant's records including them, it is within the discretion of the trial judge, sitting without a jury, to refuse to allow the plaintiff, for the purpose of showing inaccuracy in the defendant's records, to cross-examine a witness for the defendant to prove that a certain car, not shown to have contained any part of the shipment of coal, was entered as having been sent between the point of shipment and the point of destination as a part of the train on which the shipment was made, when in fact it never had been sent, the

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judge having permitted the plaintiff to show that any car which was received at the point of destination as a part of this train either was not recorded or was recorded erroneously.

A presiding judge is free to exercise his discretion in refusing, on objection made, to allow cross-examination upon a collateral matter, although testimony similar in character to that excluded has been admitted without objection on the other side.

TORT for an alleged failure to deliver three car loads of coal entrusted to the defendant as a common carrier for delivery to the plaintiff. Writ dated July 12, 1904.

The answer contained a general denial and, by amendment, an allegation that the defendant had delivered to the plaintiff the coal referred to in the declaration. In the Superior Court the case was tried before *Hardy*, J., without a jury. He found for the defendant; and the plaintiff alleged exceptions to the exclusion of certain evidence which is described in the opinion.

R. L. Raymond, for the plaintiff.

A. R. Tisdale, for the defendant, submitted a brief.

SHELDON, J. This is an action for the non-delivery of seventy-four tons of coal received by the defendant as a common carrier at Salem and shipped to the plaintiff at Lawrence, in three cars, numbered 5512, 7141 and 21607. These car loads were part of a shipment to the plaintiff at Salem of coal from the barge Sagua, which comprised in all sixty-one cars. The plaintiff had two tracks on its property, on which the defendant was accustomed to deliver freight, which were connected with the defendant's tracks by a bridge over a canal, and cars were considered by both parties to be delivered to the defendant only when they had been set across this bridge. The question in dispute was whether these three cars had been so delivered. The judge of the Superior Court before whom the case was tried without a jury found for the defendant; and the plaintiff alleged exceptions to the exclusion of certain evidence.

The plaintiff put in evidence that records of coal cars delivered to it were kept by two men, one of whom, named Serdorfsky, entered the numbers of cars as they were put upon the plaintiff's tracks, and the other took the numbers of the cars as they were unloaded, on slips of paper which he later compared with the entries on the first man's book; that the

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records of both these men showed the receipt of the other fifty-eight cars but not of these three; and that on the day in question special search was made for these three cars, because of the fact that they were listed with other cars on postal cards sent from the defendant's wharf at Salem notifying the plaintiff of shipments of coal. On the other hand it appeared from the records of the defendant that the numbers of the cars consigned to the plaintiff were taken at South Lawrence, some distance from the plaintiff's mills, upon their arrival there; that a list was made of these cars when placed in a switching train, and given to the conductor of that train, and that these three cars appeared in this list as having been sent in a switching train which left South Lawrence on the afternoon of December 1, 1902. One Wilson, a brakeman of the South Lawrence switching train, testified that he wrote down in a book the numbers and destination of the cars in that train, and put down on a paper called his switching list the numbers of the cars which were delivered on the plaintiff's tracks, and copied this list into his book in the evening, and that this list included the numbers of the three cars in question; and he testified from his records that these cars were delivered that day on the plaintiff's tracks.

The defendant also by this witness put in evidence to show that some thirty cars of this shipment, which according to the plaintiff's records had been delivered on these tracks on the first day of December, were actually delivered on the second day of that month, and that he had seen cars put upon those tracks without Serdorfsky's taking their numbers or a record of them. This evidence was admitted without objection. The bill of exceptions then states that "the defendant was permitted to put in evidence by several witnesses that cars other than the three in question, but comprised in the same shipment, were listed on the plaintiff's records as received on December 1, when it appeared from the defendant's records that they were not delivered until December 2. An illustration of this is found in the testimony of Wilson" above stated. "On the other hand the plaintiff was not permitted to cross-examine the defendant's witnesses for the purpose of showing inaccuracy of the defendant's records in respect to the same shipment, namely,

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coal from the barge Sagua. If he had been allowed to cross-examine on this point, counsel for the plaintiff would have shown that according to the defendant's records a certain car numbered 6608 had been sent from Salem and received at South Lawrence, when as matter of fact this car had never been sent, and appeared on the Boston and Maine records in error." And the bill then sets out in detail the testimony offered and excluded.

We think it appears from this that the judge refused to allow the plaintiff to show that a car numbered 6608, not claimed to have contained any part of this shipment of coal, was erroneously stated on the defendant's record to have been included in the train on which the shipment was made, when in fact it had not been sent from Salem and had not been received at South Lawrence; but did allow the plaintiff to show that any car which had been received at South Lawrence as a part of this train was either not recorded or was recorded erroneously.

We think that all this evidence was offered merely to show a mistake in the defendant's records upon a matter which was immaterial in this case, as it was not claimed that this car numbered 6608 contained any of the coal shipped to the plaintiff, or was stated in the defendant's records to have been consigned to the plaintiff or to have been delivered to the plaintiff. The only effect, if admitted, would have been to show that there had been a mistake made in the defendant's records of the cars included in a freight train from Salem to South Lawrence, by including in the train a particular car which was not actually a part of it. This was purely a collateral matter, and it was none the less a collateral matter because that train was in fact made up of cars which were afterwards to be sent from South Lawrence to the plaintiff. It was within the judge's discretion to limit or exclude cross-examination as to this question. *Commonwealth* v. *Fitzpatrick*, 140 Mass. 455. *Levin* v. *Vannevar*, 137 Mass. 532. *Tuttle* v. *Lawrence*, 119 Mass. 276.

The plaintiff has argued that this testimony was competent as of right, to impeach or discredit the defendant's records by showing a specific mistake in them, and contends that it is analogous to the right to impeach the general character of a witness by evidence of specific instances of wrongdoing not themselves relevant to the issue on trial. But that never has

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been allowed as a matter of right in this Commonwealth. *Holbrook* v. *Dow*, 12 Gray, 357.

The plaintiff also contends that it does not appear that the ruling of the court excluding the testimony was the result of an exercise of judicial discretion; that the judge did not exercise a fair judicial discretion, but acted arbitrarily; and that precisely the same sort of testimony was admitted to discredit the plaintiff's records. But we do not think that these contentions are made out.

The testimony admitted to discredit the plaintiff's records was all received without objection. And while it is manifest that the judge did not at first understand the plaintiff's offer of proof, and was then disposed to admit the testimony offered, we do not think that the exceptions show that he did not fully understand the plaintiff's offer when he made his final ruling, or that his ruling was not made as a matter of discretion and in the proper exercise of his discretion.

In spite of the statement in the exceptions already quoted, we do not think that it appears from the report afterwards made in the exceptions of the nature and extent of the testimony offered "that the plaintiff was not permitted to cross-examine the defendant's witnesses for the purpose of showing inaccuracy of the defendant's records in respect to the same shipment." We think that what the plaintiff was not allowed to do was to show such an inaccuracy with reference to another car in no way connected with this shipment, though it may have been erroneously stated in the defendant's records to have been included in the same train.

The plaintiff's other exception has not been argued, and appears to have been waived.

On the whole we are of opinion that the order must be

Exceptions overruled.

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EDWARD H. WIGGIN *vs.* EDWIN C. HOLBROOK & another, trustees.

Suffolk. November 21, 1905. — January 4, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Agency, Commission. *Broker*. *Contract*.

The owner of a note and a mortgage of land securing it by offering to pay a broker, who has full knowledge of the character of the mortgage, a commission for selling the note and mortgage makes no implied agreement that if the broker will find a purchaser the mortgage will give the purchaser a perfect title to the land in case the note is not paid.

A broker, who undertakes to find a purchaser for a note and mortgage made by a cemetery association, is not entitled to a commission for procuring a person who agrees to take the note and mortgage if the title created by the mortgage is satisfactory to his conveyancer and afterwards refuses to take them on such title not being satisfactory to his conveyancer because in the conveyancer's opinion a perfect title cannot be acquired by foreclosure against a cemetery association, and it does not matter whether the conveyancer's opinion is correct or not.

CONTRACT, by a real estate and mortgage broker against the trustees under a will, to recover a commission of $2,500 for the alleged procuring of a purchaser of a note and mortgage owned by the defendants as such trustees. Writ dated March 2, 1904.

At the trial in the Superior Court before *Richardson*, J., without a jury, it appeared that the defendants were the owners of a note and mortgage given to them by the Boston Catholic Cemetery Association dated August 21, 1899, for the sum of $85,000, payable in ten years from its date with interest at five per cent per annum, which had been assigned by the defendants to the Provident Institution for Savings in Boston as security for a loan to the defendants of $50,000, and that the plaintiff knew this fact. It further appeared that the defendants offered to pay $2,500 as a commission for negotiating a sale of the mortgage in a reasonable time, "say the next thirty days," and that the plaintiff procured an agreement with William A. Munroe, Esquire, as trustee, which is described in the opinion, and which resulted as there stated.

At the close of the evidence the plaintiff requested the following rulings, besides four others which were made by the judge:

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"1. Upon all the evidence the finding must be for the plaintiff."

"4. The plaintiff found a customer, to wit, William A. Munroe, who was ready, able and willing to take an assignment of said mortgage.

"5. The title to said mortgage given by the Boston Catholic Cemetery Association to E. C. Holbrook, et als., trustees, was not marketable.

"6. The title to said mortgage was such that William A. Munroe, the customer whom Edward H. Wiggin had procured, reasonably refused to take an assignment of it.

"7. The plaintiff did all he was employed to do, and was entitled to the sum of twenty-five hundred dollars to be paid him by the defendants upon the plaintiff's producing a customer who was ready, able and willing to take an assignment of said mortgage.

"8. If the court finds that the defendants unreasonably refused to make title to said mortgage, then it was the fault of the defendants that the trade by which William A. Munroe was to take an assignment of said mortgage from said trustees fell through.

"9. The defendants refused to give an assignment of said mortgage conveying a good and sufficient title thereto, and since the defendants refused to make title, and finally refused to negotiate through the plaintiff with William A. Munroe, the plaintiff's customer, then the plaintiff is entitled to recover the stipulated sum of twenty-five hundred dollars.

"10. It was through the fault of the defendants that the assignment of said mortgage was not actually taken by the plaintiff's customer, William A. Munroe.

"11. The plaintiff acted in good faith and did all he was required to do in order to entitle him to said commission."

"14. The defendants waived the right to demand a written agreement from William A. Munroe to take an assignment of said mortgage for eighty-five thousand dollars.

"15. The title to said mortgage was defective and not marketable in that Wellington Holbrook and Edwin C. Holbrook as trustees, had no legal right to take from the Boston Catholic Cemetery Association a mortgage of the land in question.

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"16. The Boston Catholic Cemetery Association had no legal capacity to give the mortgage in question for eighty-five thousand dollars to Wellington Holbrook and Edwin C. Holbrook and George O. Smith, trustees.

"17. Even though the mortgage in question given by the Boston Catholic Cemetery Association to Wellington Holbrook et als., trustees, was enforceable in all its incidents against said Association by said trustees, still an assignee of said mortgage would take such mortgage with full notice of powers and capacity of said corporation, and accordingly would not acquire a marketable title to such mortgage.

"18. The title to said mortgage was defective, was not marketable, and was such that William A. Munroe reasonably refused to take it in the shape in which it was offered because it was not legally given under the constitution, by-laws and other laws affecting said corporation.

"19. Both defendants are jointly liable in this action."

The judge refused to make the rulings above quoted, and found for the defendants. The plaintiff alleged exceptions.

E. B. Draper, for the plaintiff.

H. G. Allen, for the defendants.

KNOWLTON, C. J. This is an action by a broker to recover a commission for the sale of a note and mortgage belonging to the defendants. The sale was not consummated, because the security was not legally satisfactory to the attorney of the purchaser, who thought that the mortgage did not give a right that could be enforced by foreclosure, in such a way as to convey to the purchaser at a foreclosure sale a perfect title to the real estate. The note and mortgage were given by the Boston Catholic Cemetery Association, for money which was used in the purchase of the real estate described in the mortgage.

The plaintiff contends that he procured a purchaser who was able, ready and willing to take the note and mortgage, if the mortgage conveyed a good title to the real estate described in it, and that the defendants impliedly agreed with him that the mortgage was enforceable, so as to make a perfect title to the property, if there should be a failure to pay the note. He fails upon both branches of his contention. In the first place, he was not employed to sell real estate, to which his employers

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impliedly agreed that they would give a perfect title if he should find a purchaser. His employment was to sell a note and mortgage as they were, and he testified that, nearly a year before he entered upon his last employment for this purpose, he knew of the mortgage, knew what land it was on, and all the details of it. He knew, of course, that it was given by the Boston Catholic Cemetery Association. If the law relating to cemetery associations affected the validity of the mortgage, he knew the facts which bore upon the question of title, before he undertook to make the sale. The defendants did not agree with him, expressly or by implication, that the title which the mortgage purported to convey was free from legal objection, in reference to the power of such a corporation to make a mortgage. He undertook to sell a note and mortgage made by a cemetery association, and unless he found a purchaser who was ready to take the mortgage notwithstanding the character of the mortgagor, he did not earn his commission. So far as appears, the only question made by the attorney of the purchaser, in regard to the mortgage, was founded on the fact that the mortgagor was a cemetery association. The contract between the plaintiff and the defendants related to a mortgage given by such a corporation, and the defendants were under no obligation to change the mortgage. See *Tombs* v. *Alexander*, 101 Mass. 255.

The plaintiff failed to procure a purchaser who was ready to take the note and mortgage. According to the undisputed testimony of himself and of Mr. Munroe, who were the only witnesses on this part of the case, Mr. Munroe, as a trustee, agreed to buy the note and mortgage if the title created by the mortgage was satisfactory to Mr. Sprague, his conveyancer. His only contract in regard to the matter was subject to this condition. The title was not satisfactory to Mr. Sprague in the particular above referred to. There was a dispute between eminent conveyancers in regard to the effect of the mortgage in this particular. Without reference to the question whether the title under the mortgage was in fact valid or invalid, Mr. Munroe declined to complete the purchase, because the title was not satisfactory to his conveyancer, by whose opinion he chose to be guided. Upon the express condition of his contract with the plaintiff, the agreement was of no effect. The plaintiff, therefore, failed to procure

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a purchaser who was ready to take the securities. The condition of his contract of sale was not that the title should be good, but that it should be satisfactory to a particular conveyancer, on whose judgment the purchaser relied. The defendants were at all times ready to assign the note and mortgage, if the plaintiff should find a purchaser who was ready to take them. The failure to make a sale was not the fault of the defendants, but the misfortune of the plaintiff, who failed to find a purchaser who would contract to buy them. See *Fitzpatrick* v. *Gilson*, 176 Mass. 477.

Upon the undisputed facts, it became unnecessary for the presiding judge to determine the question between the conveyancers as to the validity of the mortgage.

Exceptions overruled.

VIELLA ROBINSON *vs.* JOSEPH H. VAN AUKEN.

Suffolk. November 22, 1905. — January 4, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Slander. Larceny. False Imprisonment.

In an action by a bookkeeper against her employer for slander in charging her with larceny of money in the presence of a police officer called by him to arrest her, the communication is privileged only if made in good faith and without malice, and if it appears that the defendant was angry when he made the charge, it is a question of fact for the jury whether he was acting in good faith or in part from malice.

In an action for slander in charging the plaintiff with larceny of money belonging to the defendant, it is not necessary to prove that the exact words alleged in the declaration were spoken. It is enough to prove that such of the words as are necessary to constitute a charge of larceny were spoken in substance by the defendant.

Reasonable ground for believing that a woman employed as a bookkeeper in a picture store has stolen a sum of money less than $100 from her employer while in the store in his presence does not justify a police officer in arresting the woman without a warrant, and if by direction of her employer he arrests her without a warrant and locks her in a cell at the police station, she may maintain an action against her employer for false imprisonment.

TORT for alleged false imprisonment and slander. Writ dated June 20, 1902.

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In the Superior Court the case was tried before *White*, J. upon the second count alleging false imprisonment and the fifth count alleging slander. It appeared that the plaintiff, a girl nineteen years of age, had been employed as bookkeeper and cashier in the picture store of the defendant on Washington Street in Boston for about two weeks; that at the close of business on Monday June 16, 1902, following her usual custom she took the day's receipts, less a certain amount left for change in the cash drawer, put it in an envelope marking it "Monday, $74.55," procured from the defendant the key to the locked compartment of the safe, unlocked it, put the envelope in and locked it again, handing the key back to the defendant who was standing within a foot or two of her; that on Tuesday, it being the seventeenth of June, the store was closed, and on Wednesday night she again made up her receipts, procured the key from the defendant and unlocked the compartment for the purpose of putting in the envelope, the defendant standing the same distance from her as before, whereupon she noticed that Monday's envelope was not in the drawer and called his attention to the fact, and after search for the missing envelope had been made, he began to get excited and accused her of stealing the money, which she denied, and he thereupon sent for an officer, and in his presence according to the testimony of the plaintiff accused her of stealing the money and directed her arrest; that she was taken by the officer to the Lagrange Street station and locked in a cell, and later was taken in a wagon to the city prison where she was confined in a cell all night and in the morning was brought into the Municipal Court of the City of Boston and discharged. No warrant ever was issued for her arrest, the judge of the court declining to issue one.

Among requests for other instructions, which were given in substance, the defendant asked the judge to instruct the jury: "2nd. That upon the pleadings and all the evidence the plaintiff is not entitled to recover upon the second count. 5th. That upon the pleadings and all the evidence the plaintiff is not entitled to recover upon the fifth count."

The judge refused to give either of these instructions.

The ninth instruction requested was as follows: "9th. The offence of larceny of money in a building is a felony and a police

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officer may lawfully arrest, without warrant, any person whom he suspects of having committed such felony."

The portion of the charge to the jury relating to this subject was as follows:

"Now personal property in a building for the most part is either in the custody of persons or in the custody of buildings. You may take any store upon Washington Street in which there is no watchman at night, somebody comes there in the morning, opens the store, during the day the clerks come there, some of the clerks or the proprietors, the servants or agents of the proprietors stay there during the day. If the business hour of that firm closes at seven o'clock then the key is turned in the door and property which has been in the custody of persons during the day, upon the turning of that lock becomes then in the custody of the building, and if the clerk who last left the store at night failed to lock the door and left it ajar, and somebody should come along there and go into that open door, which was open ever so slightly, and steal some of the personal property in there, that would be larceny in a building, because the property at the time was in the custody of the building, and that would be a felony, that is punishable by imprisonment in our State prison; but if before the turning of that key, some time during the day while the property was in the custody of persons, that same party had gone in there and stolen the same personal property it would then, if under the value of $100, be simple larceny, and the difference in the degree of the crime is fixed because in one instance it was in the custody of persons who could actively protect their property and in the other instance it was not in the protection of any persons but was in the protection of a building, and the law says that that is the greater crime to go to a building where a man has left his property in supposed safety for the night, and a man getting in to a building that is partially open so that he does not have to break and enter it, because if he does have to break and enter it to get in that is still another offence, but it is a greater offence to steal under those circumstances than it is to steal in the daytime when the parties are around there to protect their property.

"So that in this case, you have heard the testimony in this case as bearing upon the question of whether there is any evidence

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here to support the contention that there was a larceny in the building, that is, larceny of property which at the time it was taken, if it was taken at all, was taken from the building while in the custody of the building and not of the person. And it was for that purpose that the officer who made the arrest was asked whether the same account that was given to him on that day was the same which was given here in court. And what was the evidence here in court, because he said that the testimony as he had heard it given here in court was the same that was given to him at that time as to the way the property was supposed to have been stolen from that safe.

"Now was the evidence which he heard and which he said was the same, that somebody in the employ of Van Auken came there and opened the door and swept out and then the clerk and the workmen came and Mr. Van Auken came and last of all came the bookkeeper, the plaintiff in this case, and at night she was not left there, that she was the first to leave, reversing the order, that she was the last to come and the first to leave, and that the only opportunity that she had so far as disclosed by the statements which were then made to him or as far as disclosed by the evidence in this case, was that if she stole at all it was while the proprietor was within two or three feet of her, during the time that he passed the key to her and she unlocked and passed it back to him. Now if the only evidence in this case is of that kind, of a larceny, provided always that a larceny — and it is not necessary for you to pass on the question of whether a larceny was committed or not, but if a larceny was committed there at that time, it was then simple larceny, because the sum taken was less than $100, being $74.55, and if it was simple larceny upon this evidence then the arrest was not warranted either by the officer or by the direction of the defendant, because a private person, Van Auken himself, provided he had gone to his store and found a man committing a felony there, he could have arrested for that felony himself, not being an officer, as the law says that he may do that and rest for his justification upon the conviction of the man. He has got to run that risk, but an officer under the circumstances of where a felony has been committed, either seeing it done or after it is done, may proceed upon a reasonable ground of suspicion, and where an officer has

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reasonable ground of suspicion that he has found the right person he may arrest and the law justifies him in the arrest, although as a matter of fact it turns out that he has not arrested the right person.

"Now it is for you to say in this case whether there is any evidence which will warrant you in believing that the officer there after this statement had been made to him, whether there is any evidence that would warrant you in believing or finding that he at the time honestly believed and had reasonable ground to believe, a reasonable suspicion, that a felony had been committed, because if upon this evidence he did not have a reasonable ground to believe that a felony had been committed or if there was not a reasonable suspicion directed to him by the information that he received, by such as he got from the defendant and from the plaintiff, if he did not believe that a felony had been committed, then he had no justification for the arrest. It was simple larceny. And so if you find that upon this evidence he at the time believed that only a taking of the money from the safe although the safe was in that building he would not be warranted in making the arrest because no felony had been committed, and if that arrest were followed without any justification under those circumstances and it was directed or commanded or controlled by the defendant himself, in directing the actions of the officer, why, then the defendant would be put in the position of being responsible for an arrest without any justification for the arrest, and you would assess as far as this case is concerned such damages as accrued to her by reason of such illegal arrest. If, on the other hand, you find that he honestly believed and had ground to believe that a felony had been committed and that although in the event that no such felony had been committed, but he had a reasonable suspicion that it had, then there would be a justification and so far as this count is concerned, you would find for the defendant."

See R. L. c. 208, §§ 20, 26.

The jury returned a verdict for the plaintiff upon each of the counts on which the case was tried, assessing damages upon the second count, for false imprisonment, in the sum of $1,000, and on the fifth count, for slander, in the sum of $500. The defendant alleged exceptions.

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C. W. Rowley, for the defendant.

W. D. Chapple, for the plaintiff.

KNOWLTON, C. J. This case was submitted to a jury on two counts, one for slander and the other for false imprisonment. The alleged slander was in making a charge of larceny against the plaintiff in the presence of a police officer whom the defendant induced to arrest and imprison her. The judge ruled in favor of the defendant, that the occasion was privileged, and that the defendant was not liable if he made the charge in good faith and without malice. He said: "And so you will see that he would be excused so far as the count of slander is concerned, unless in saying what he did to the officer, at the time he said it, he said it not in good faith, but said it wantonly and recklessly and maliciously in the sense that he did it out of an entire disregard to the rights of the person whom he was accusing." We are of opinion that the defendant has no good ground of exception to this instruction. The protection of a privilege of this kind is lost by an abuse of the privilege. *Bradley* v. *Heath*, 12 Pick. 163. *Brow* v. *Hathaway*, 13 Allen, 239.

The defendant contends that there was no evidence that would warrant the submission to the jury of the question whether the defendant acted in bad faith, and with actual malice, in making the charge. While the evidence on this point would have well warranted a finding that he was acting within his privilege, the defendant himself testified that he got angry on the occasion when he made the charge, and, when asked what his feelings toward the plaintiff were, answered: "I was mad, a little mad at that time." The plaintiff testified to his conduct indicating the same thing, and we think it was a question of fact for the jury whether he was acting in good faith, or in part from malice.

The defendant's fifth request for instructions includes the question whether the evidence warranted the jury in finding that the material allegations of the declaration were proved. It was not shown that the exact words charged were spoken, and the question is whether the substance of the language was proved. The plaintiff was not bound to prove all the words set out in the declaration. It was enough if she proved the substance of such of these words as were necessary to constitute a charge of larceny. *Clark* v. *Brown*, 116 Mass. 504. *Whiting* v.

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Smith, 13 Pick. 364. While the form of the language used by the defendant was not very particularly inquired about by the counsel on either side, and the statements were rather general, there can be no doubt that, in a variety of forms, the defendant, in the presence of the police officer, charged the plaintiff with a larceny of money. A part of the language alleged in the declaration to have been spoken is, "I charge her with the larceny of my money." The plaintiff testified to different expressions of the defendant in the presence of the officer, which amounted to a charge of larceny of the money, and she said of the defendant and the officer who arrested her, who were together at the police station, that "they told the sergeant at the desk that he accused me of taking this money and I was held." We are of opinion that there was no error in the trial upon the count for slander.

As to the count for false imprisonment, the only material departure of the presiding judge from the contention of the defendant's counsel was in regard to the nature of the offence for which the plaintiff was arrested. The legality or illegality of the imprisonment depends upon whether the officer had reasonable cause to believe her guilty of a felony. The evidence tended strongly to show that he had reasonable cause to believe her guilty of larceny; but the money alleged to have been stolen was only $74.55, and there is no contention that the stealing of this was a felony, unless the crime was larceny in a building. According to the undisputed testimony, the plaintiff's only opportunities to steal the money were on June 16, while she had it in her hands in the performance of her duty as bookkeeper, and took the defendant's key in his presence to unlock the compartment in the safe into which it was to be put, and on June 18, in the morning, when the defendant gave her the key to unlock the compartment, and after she had unlocked it and taken the money into her hand, in his presence, by his authority. She could not have taken the money while it was in any sense in the custody of the building, and it was possible for her to take it only while she had the custody of it in his presence, and while the compartment was unlocked. Larceny under such circumstances would not be larceny in a building. *Commonwealth* v. *Lester*, 129 Mass. 101. These were the circumstances of the alleged stealing, as they were stated to the officer. The judge

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rightly submitted to the jury the question whether the officer, who imprisoned her at the defendant's request, had reasonable ground for believing that she had committed larceny in a building, as distinguished from simple larceny.

Except in the particulars referred to, the defendant's requests for instructions were given in substance.

Exceptions overruled.

ERIC G. BERGFORS *vs.* EDWARD CARON.

Norfolk. November 22, 1905. — January 4, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Mechanic's Lien. Contract.

At the hearing upon a petition under R. L. c. 197, to enforce a mechanic's lien it appeared that the contract price for the work which the petitioner was to do including labor and materials was a round sum of $200. The jury found that the petitioner did not fully perform his contract, that by reason of this failure $25 should be deducted from the contract price, and that the value of the labor and material furnished was $175. *Held*, that these findings were consistent with a finding that the petitioner attempted in good faith to perform his contract and substantially performed it, and that, the petitioner having received already $50 on account, an order of the presiding judge that the lien be established for the sum of $125 should be sustained.

PETITION, filed September 4, 1903, to enforce a mechanic's lien.

At the trial in the Superior Court before *Hitchcock*, J. there was evidence that the petitioner made an oral contract with the respondent, by the terms of which the petitioner was to move a barn a distance of one hundred feet more or less, and furnish the work, labor and materials necessary to remodel the barn, so that it might be used by the respondent as a dwelling house, for which the respondent was to pay the petitioner the sum of $200.

The petitioner testified that he finished the work and furnished the materials required of him by the agreement between himself and the respondent. This was denied by the respondent and two other witnesses, a mason and a carpenter, who testified to work done by them on the building and its foundations after

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the time at which the petitioner testified that he had finished the work. It was also in evidence that the amount paid to the mason and the carpenter by the respondent for the work done by them on the building after it was left by the petitioner was $39.50.

The petitioner, the respondent and two other witnesses testified as to what the work, labor and materials furnished were worth; and it was admitted that the petitioner had received $50 on account of work done and materials furnished.

Four issues were framed and submitted to the jury, which with the answers thereto were as follows:

"1. Did the petitioner perform the labor and furnish the materials called for by the oral agreement between the petitioner and the respondent? The jury answer, no.

"2. If the petitioner did not fully perform his contract what deduction should be made from the contract price by reason of such failure? The jury answer, $25.

"3. What was the value of the labor rendered and furnished by the petitioner under this contract? The jury answer, $80.

"4. What was the value of the materials furnished by the petitioner and actually used by him in the performance of the contract? The jury answer, $95."

After this verdict the petitioner moved for an order to establish the lien, and thereupon the respondent requested the judge to rule as follows:

This being a petition to enforce a mechanic's lien under an entire contract for an entire price, the jury having found that the petitioner did not perform the labor and furnish the materials called for by the oral contract between himself and the respondent, there being no evidence that the failure to perform the contract was due to mistake or misunderstanding or to anything else save the petitioner's own fault, or that the contract lacked performance in unimportant details, the testimony of the petitioner being to the effect that he performed the labor and furnished the materials called for by the contract, and the testimony offered by the respondent, which was not controlled, and the answer of the jury to the second issue submitted to it showing that the contract lacked substantial performance by the petitioner this lien cannot be enforced and should be dissolved.

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The judge refused to rule as requested, and ordered that the lien be established for the sum of $125 with interest from the date of the petition, and that the interest of the respondent in the land described in the petition be sold, together with the building thereon, and the proceeds of the sale distributed in the manner provided by law. The respondent alleged exceptions.

E. J. Parker, for the respondent.

J. L. Edwards, for the petitioner.

KNOWLTON, C. J. This is a petition to enforce a mechanic's lien. The contract price for the work which the petitioner was to do, which included labor and materials, was $200. Four issues were submitted to the jury, on which they returned a verdict saying that the petitioner did not fully perform his contract, that $25 should be deducted from the contract price by reason of his failure fully to perform it, and that the value of the labor performed and furnished and of the materials furnished by the petitioner was $175. These findings are entirely consistent with the finding that the petitioner attempted in good faith to perform his contract, and substantially performed it. In *McCue* v. *Whitwell*, 156 Mass. 205, 207, which was a petition to enforce a mechanic's lien, this court said, "There are other cases where a builder may recover, under a contract to erect or repair a building on real estate, without showing complete performance of his contract. If he has acted in good faith in an effort to perform it, and has substantially, although not fully, performed it, he may recover the contract price, less such deduction as should be made on account of the errors or omissions in doing the work." This is an application of a rule of the common law to suits for the enforcement of mechanics' liens.

The evidence is not reported, and the bill of exceptions contains but a brief statement of facts. At the hearing before the judge, the respondent made a request for a ruling which assumed conditions in regard to the evidence, some of which do not appear in the bill of exceptions. There was nothing in the case to preclude the judge from finding that the petitioner, in good faith, attempted to perform the contract, and accomplished a substantial, although not a complete, performance of it.

Exceptions overruled.

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PERSON NOYES *vs.* COMMERCIAL TRAVELLERS' EASTERN ACCIDENT ASSOCIATION.

Middlesex. November 23, 1905. — January 4, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Insurance, Accident. Fraternal Beneficiary Association. Contract, Construction. *Evidence,* Burden of proof.

In an action on a certificate issued by a fraternal beneficiary association, to recover an indemnity for the loss of a leg by a railroad accident, if it appears that the plaintiff seasonably filed with the defendant a claim for indemnity, as required by the terms of the certificate, containing a sufficient statement of his claim, in proving his case in court he is not to be limited to the details of fact or evidence contained in his preliminary statement.

In an action on a certificate issued by a fraternal beneficiary association, agreeing to indemnify the plaintiff against disability caused by external, violent and accidental means, and containing a provision that the indemnity shall be paid "within sixty days from the receipt by its board of directors of proof satisfactory to said board of the particular disability suffered by said member," it is a question for the jury whether the plaintiff furnished proof which reasonably should have satisfied the directors.

In an action on a certificate issued by a fraternal beneficiary association, agreeing to indemnify the member against disability caused by external, violent and accidental means, but excepting accidents caused by the member's voluntary exposure of himself to unnecessary danger, accidents which the member by the exercise of ordinary care might have prevented, accidents to which his own negligence contributed, and accidents caused by disease, if the defendant relies on any of these exceptions as a defence to the plaintiff's claim, the burden is on him to show that the accident is within the exception, and the plaintiff, having proved that his disability was caused by external, violent and accidental means, is not called upon to disprove the existence of facts which would bring his case within the exceptions.

In an action on a certificate issued by a fraternal beneficiary association, agreeing to indemnify the member against disability caused by external, violent and accidental means, but excepting accidents caused by the member's voluntary exposure of himself to unnecessary danger, accidents which the member by the exercise of ordinary care might have prevented, accidents to which his own negligence contributed, and accidents caused by disease, if there is evidence that the plaintiff, a man seventy-eight years of age, was on the platform of a railroad station, and, as his train approached, walked forward on the platform near the side of the train before it stopped, intending to take a forward car, when suddenly without any apparent cause his right foot gave way and he fell in such a way that his left foot was crushed by the train, the questions whether the plaintiff was negligent, and whether the sudden giving way of the foot without apparent cause was a disease are for the jury.

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CONTRACT by a member of a fraternal beneficiary association, incorporated under St. 1894, c. 367, upon his certificate of membership, to recover $2,500 as an indemnity for the loss of his left leg by an accident on August 24, 1904. Writ dated December 31, 1904.

In the Superior Court the case was tried before *Bell*, J. It appeared that the certificate sued upon was as follows:

"No. 1008.

"Commercial Travellers' Eastern Accident Association doth hereby certify that Person Noyes of Lowell, Mass., has this day been elected a member of said Association; and, in consideration of the receipt from said member of the entrance fee, the warranties and agreements in his application for membership contained, the payment by said member of all assessments levied by the Board of Directors, and the faithful compliance by said member with the By-Laws of said Association, doth hereby covenant and agree with the said member, his executors and administrators, as follows, that is to say: —

"1st. That within ninety days from the receipt by the Board of Directors of the said Association of proof satisfactory to said Board of the death of the said member, and that his death has been caused wholly and entirely by external, violent, and accidental means, which (except only in case of accidental death by drowning) shall leave upon the body of said member an external and visible mark, the said Association, provided the death of the said member shall have occurred within ninety days from the happening of the said means of death, will pay to Adelaide A. Noyes (his wife) the amount realized from one Death Assessment of two dollars levied upon each surviving member of the said Association, not to exceed the sum of five thousand dollars ($5,000).

"2nd. That if said member shall suffer disability caused by external, violent, and accidental means, which shall leave upon the body of said member an external and visible mark, the said Association, in accordance with the provisions of its By-Laws, within sixty days from the receipt by its Board of Directors of proof satisfactory to said Board of the particular disability suffered by said member, will from the amount realized from one

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Disability Assessment of two dollars levied upon each member of said Association, pay to said member, whose name is above written, indemnity as follows, that is to say: —

"*A.* For the loss of both eyes or of the sight of both eyes, or for the loss of both legs, or of both arms, or of one arm and one leg, the total amount realized from said assessment, not to exceed the sum of five thousand dollars ($5,000).

"*B.* For the loss of one leg, or of one arm, or for an injury which alone, in the judgment of a competent surgeon, selected by the Board of Directors, has caused total disability, rendering said member unable to perform any duties or follow any occupation for a period of not less than two years, and who shall have been, by said Board, adjudged to be permanently totally disabled, one-half of the amount realized from said assessment, not to exceed the sum of twenty-five hundred dollars ($2,500).

"*C.* For the loss of one eye or the sight of one eye, one-fourth of the amount realized from said assessment, not to exceed the sum of twelve hundred and fifty dollars ($1,250).

"Provided, that any loss above named shall have occurred within three calendar months after the accident which caused it; and provided further, that the word loss as applied to arm or leg is hereby construed and agreed to mean actual amputation; and provided further, that any sums theretofore paid to said member suffering said permanent disability, as weekly indemnity under clause D of this section of this certificate, for the same disability, shall be deducted from said larger sum.

"And upon payment to said member of either of the sums above named, the liability of the Association shall cease, and this certificate of membership shall thereafter be null and void.

"*D.* For temporary total disability the sum of twenty-five dollars ($25) for each and every week during which said disability has existed, and thereafter a like sum of twenty-five dollars for each and every week that said member shall furnish to said Board of Directors satisfactory proof of the continuance of such total disability. But in no event shall the said member be paid the said sum of twenty-five dollars per week for a longer period than fifty-two weeks, or a sum greater in the aggregate than the total amount realized from the said assessment.

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"The foregoing covenants and agreements are upon the following express conditions, that is to say: —

"(Extract from By-Laws. Art. VIII.) No indemnity shall be paid to any member for any disability or injury of which there shall be no external and visible mark on the body of the member, nor for any injury caused wholly or in part, directly or indirectly, by hernia, fits, vertigo, somnambulism, insanity, or disease in any form, or by gas, or poison in any form, contact with poisonous substances, surgical operations, medical treatment, duelling, fighting, boxing or wrestling, war, riot, lifting or overexertion, suicide, sunstroke, freezing, riding or driving in races, or voluntary exposure to unnecessary danger; nor for any injury or accident happening to a member while under the influence of intoxicating drinks, or of drugs, or of gas, or in consequence of having been under such influence, nor while or in consequence of violating the law; or while mining, blasting, or wrecking, or while employed in the manufacture, sale, or transportation of any explosive compound. Nor for any injury which the member, by the exercise of ordinary care, prudence, and foresight, might have averted or prevented, or to which the member's own negligence shall have contributed. Nor shall any indemnity be paid to the beneficiary of any member for the death of said member resulting from an injury caused wholly or in part, directly or indirectly, by either of the foregoing causes.

"No indemnity for either death or disability shall be paid unless the person claiming such indemnity shall give immediate notice in writing to the Secretary and Treasurer, setting forth the name of the member, the number of his certificate, full particulars of the injury, the names and addresses of the attending physician and of all persons who saw the accident happen, or the injury inflicted, so far as the same can, by the exercise of due diligence and good faith by the claimant, be obtained. Nor unless direct and affirmative proof of the death or disability shall be furnished the Association within six months from the happening of any accident causing such death or disability, upon forms established by the Board of Directors.

"No indemnity for death shall be paid unless the physician and surgeon appointed by the Board of Directors be permitted to examine the body of the member whose death is alleged to

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have been caused by accident, and for whose death indemnity is claimed, nor unless an autopsy is allowed upon said body if required. And no indemnity for disability shall be paid unless said physician and surgeon be allowed to examine the body of the member claiming such indemnity, when and as often as such physician and surgeon deems it necessary so to do in the interests of the Association.

"(Order of Board of Directors.) Ordered — That it shall be the duty of each member of the Association to give to the Secretary immediate notice of any change in the occupation, residence, or postoffice address of such member.

"In Witness Whereof, the said Commercial Travellers' Eastern Accident Association, hath caused its corporate seal to be affixed hereto, and these presents to be signed by its President and Secretary and Treasurer, at Boston, in the Commonwealth of Massachusetts, this twenty-third day of March in the year one thousand eight hundred and ninety-five.

[Corporate Seal.] "Edwin A. Towne, President.
"Lauris J. Page, Secretary and Treasurer."

The plaintiff put in evidence a notice of injury on the form required by the defendant dated August 31, 1904, which had been delivered seasonably by him to the company. It stated the time and place of the accident, and described its cause as follows: "Was knocked down by a moving train in the railway station at South Lawrence, Mass. falling under the cars in such a way that the wheel passed over my left foot, crushing it, so that amputation was necessary." It gave the names of three physicians and surgeons attending the plaintiff, and gave the names and residences of one Riley and one Nugent as persons who saw the accident. The plaintiff also put in evidence his claim for indemnity dated October 20, 1904, made out upon the required form and seasonably delivered to the defendant. It contained, among others, the following questions and answers:

"5. Were the injuries received by you through external, violent and accidental means? Yes. 6. What was the nature of the accident causing the injuries? Railroad accident. 7. What was the cause of the accident which you have described in your answer to Question No. 9 and which resulted in

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your being injured? Bodily contact with a moving train. 8. What was the nature of the injury received? (Describe fully.) Left foot crushed necessitating amputation of the left leg below the knee. 9. What external and visible marks did the injury leave upon your body? (Describe and give exact location of each.) A crushed leg skin and muscles torn." "13. What were you doing at the time of the happening of the accident? Hurry forward for my train at South Lawrence (5.45 P. M.) for Lowell. I wanted to get into the forward car for my convenience the train had not come to a full stop at the time. 14. Could you, by the exercise of ordinary care, prudence and foresight, have averted or prevented the injuries? or the accident causing the injuries? No."

The plaintiff's claim for indemnity and the statements of the witnesses Nugent and Riley constituted the only proof of the alleged accident and the consequent injury to the plaintiff which the plaintiff filed with or submitted to the defendant's board of directors as a compliance with the requirements of the defendant's by-laws, the rules and orders of the board of directors, and the contract between the plaintiff and the defendant. The defendant or its board of directors never asked the plaintiff for further or additional proof.

The plaintiff then offered in evidence the plaintiff's written deposition, taken on May 1, to which, at the time of its taking, the defendant had objected upon the ground that the evidence of the plaintiff was incompetent, irrelevant and immaterial. It was agreed that the deposition might be used as evidence in the same manner as if the plaintiff were present in court and testifying as to the facts deposed to, if his evidence was otherwise competent.

The defendant objected to the introduction of the deposition and to the introduction by the plaintiff of any evidence other than the writings put in evidence, which included those above described, and requested the judge to rule as follows:

"The plaintiff is bound by the written proofs of injury filed by him with the defendant's board of directors in compliance with the rules and orders of said board and the by-laws of the association and cannot at the trial introduce other or further evidence of his injury or of any accident causing such injury, such

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other or further evidence not having been theretofore submitted to the said board of directors in compliance with said by-laws and said rules and orders of said board."

The judge refused to make this ruling, and against the objection of the defendant admitted the deposition and the oral testimony of Nugent and Riley and of one Stevens.

The deposition of the plaintiff tended to show that the plaintiff, a man seventy-eight years of age and weighing one hundred and eighty pounds, at about 5.45 P. M. on August 24, 1904, fell under the cars of a moving train at the South Lawrence station and sustained thereby the loss of his left leg at a point eleven inches below the knee, by actual amputation under the following circumstances: The plaintiff came out of the waiting room intending to take the train for Lowell Junction, which then was moving into the station; he walked toward the train and when within five or six feet of it stopped to ascertain, by glancing toward the rear of the train, its length and the probable stopping point of the forward passenger coach into which he intended to go for his own convenience as he wished to avoid walking and to save his strength; that while he was so standing the forward coach passed him; that he then turned to walk forward alongside the train to the forward coach and as he turned his right foot gave way; that he threw up his hands and tried to gain his equilibrium; that in trying to recover his balance he fell and his left leg went under the wheel of the moving train. The plaintiff deposed that he did not know what caused his foot to give way and that it never before had given way in a similar manner.

On cross-examination the plaintiff deposed that his statements made in his claim for indemnity were true; that at the time of his injury he was bearing his weight on his right foot; that all of a sudden it went down; that he did not stub his toe; that for some unknown cause his foot went out from under him; that he turned, and then came that motion to recover himself; that on April 22, 1905, he suffered a stroke of paralysis.

The testimony of the witnesses Riley, Nugent and Stevens tended to show that the plaintiff came out of the waiting room and walked toward the train which then was moving into the station; that the plaintiff stopped when within five or six feet of the moving train; that while he was so standing his right

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foot gave way; that he lost his balance and fell, and his left leg went under the wheels of the moving train; and that there was no obstruction on the platform to cause his fall.

The defendant called the clerk of its board of directors who produced the records of the board showing that at a legal meeting of the board held on November 26, 1904, the following vote was adopted:

"Voted: That the proof submitted on October 22, 1904, by Person Noyes, Certificate No. 1008, of his total disability caused by accident is not satisfactory to this board and that his claim for indemnity be disallowed."

The clerk of the board of directors testified that no proofs of the accident and the consequent injuries to the plaintiff had been filed with or submitted to said board other than the writings mentioned.

It did not appear that any hearing before the board of directors was asked by the plaintiff or offered by the defendant.

The defendant requested the judge to give various instructions, of which the judge gave two, which are printed at the bottom of the next page, and refused the others. Among those refused were the following:

"1. On the evidence the plaintiff is not entitled to recover under the contract between the plaintiff and the defendant association."

"3. The plaintiff is bound by the written proof of injury filed by him with the defendant's board of directors in compliance with the rules and orders of said board and the by-laws of the association and cannot at the trial introduce other or further evidence of his injury, such other or further evidence not having been theretofore submitted to the board of directors.

"4. The written proof of injury filed by the plaintiff with the defendant's board of directors does not set forth a legal claim against the defendant association under the terms of the contract.

"5. The burden is on the plaintiff to prove that the written proof of the plaintiff's injury filed by the plaintiff with the defendant's board of directors, was proof satisfactory to said board of the plaintiff's injury within the terms of the contract; the plaintiff has not sustained this burden of proof and cannot recover."

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"13. If the plaintiff, a man of the age of seventy-six * years, was for his own convenience hurrying to get into the forward part of a train which was in motion and which the plaintiff knew was in motion and in such hurrying the plaintiff came into bodily contact with such moving train and was thereby injured, such injury was an injury which the plaintiff by the exercise of ordinary care, prudence and foresight might have averted or prevented and the plaintiff cannot recover.

"14. If the plaintiff, a man of the age of seventy-six * years, was for his own convenience hurrying to get into the forward part of a train which was in motion and which the plaintiff knew was in motion and in such hurrying the plaintiff came into bodily contact with such moving train and was thereby injured, such injury was an injury to which the plaintiff's own negligence contributed and the plaintiff cannot recover."

"18. The infirmity of the plaintiff resulting in the loss of control of the action of his legs is a form of disease within the meaning of the contract and the fall of the plaintiff being due to the loss of his control of the action of his legs resulting from his infirmity, the resulting injury was caused in part and indirectly by disease and the plaintiff cannot recover."

"21. The burden is upon the plaintiff under his declaration to show that the plaintiff was in the exercise of due care at the time he received his injury.

"22. The defendant's board of directors having decided that the proofs of injury submitted to said board by the plaintiff was not 'proof satisfactory to said board' of the plaintiff's injury under the terms of the contract between the plaintiff and the defendant, the plaintiff cannot recover in this action."

The judge gave the following instructions requested by the defendant:

"2. The burden is on the plaintiff to prove that his injury and the agency which produced it were caused solely by external, violent and accidental means."

"15. If the fall of the plaintiff, which resulted in his foot being crushed by a moving train, was due to a fit, vertigo, somnambulism or any form of disease, the injury to the plaintiff's

* It appeared by the bill of exceptions that the age of the plaintiff was seventy-eight years.

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foot was caused in part and indirectly by such fit, vertigo, somnambulism or disease and the plaintiff cannot recover."

The judge further instructed the jury that it was the duty of the plaintiff to submit to the defendant's board of directors only such proof of the accident and its consequent injury to the plaintiff as would be satisfactory to a reasonable person of such accident and injury, and that it was for the jury, and not for the defendant's board of directors, to say whether or not such proof as the plaintiff had submitted to the board of directors should have been proof satisfactory to the board within the meaning of the by-laws and of the contract.

The judge further instructed the jury that the burden was upon the defendant to prove that the accident and the consequent injury to the plaintiff came within the exceptions set forth in the certificate limiting the defendant's liability, namely, that it was an accident or an injury to which the plaintiff's own negligence contributed.

The jury returned a verdict for the plaintiff in the sum of $2,500 with interest from the date of the writ; and the defendant alleged exceptions.

W. F. Merritt & N. T. Merritt, Jr., for the defendant.

J. J. Hogan & W. A. Hogan, for the plaintiff.

KNOWLTON, C. J. This is an action of contract, brought by a member of the defendant fraternal benefit association, to recover $2,500 as an indemnity for the loss of a leg by a railroad accident. To maintain the action the plaintiff, at the trial, was bound to establish two propositions: First, that the accident was within the terms of the contract creating a liability; and secondly, that he furnished to the defendant, as required by the contract, satisfactory proof of the particular disability suffered by him.

The defendant objected to a part of the evidence offered to support the first proposition, on the ground that it was not included in the proof of disability furnished by the plaintiff as a preliminary to the bringing of the action. This objection was founded on the decision in *Campbell* v. *Charter Oak Ins. Co.* 10 Allen, 213, in which it was said that corrections of mistakes, in proofs of death, "are not for the first time to be made known to the insurers at the trial of the action to recover for the loss, by the introduction of evidence showing that the statements

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filed were not true in a material fact, which, if it existed as stated, was fatal to the right of the insured to recover." In *Hogan* v. *Metropolitan Ins. Co.* 164 Mass. 448, the court said, in referring to the decision, with a citation of authorities: "This case has not been generally followed in other jurisdictions. . . . In this Commonwealth it has never been treated as enunciating a doctrine of universal application, nor extended to facts differing from its own." See also *Abraham* v. *Mutual Reserve Fund Assoc.* 183 Mass. 116. In *Cluff* v. *Mutual Benefit Ins. Co.* 99 Mass. 317, 324, Mr. Justice Wells, in giving the opinion, used these words: "When an apparent ground of defence is disclosed by a separate and unnecessary narration of circumstances, and the proofs required by the policy are complete without that narration and disclosure, it cannot be said that the party has failed to comply with the condition imposed upon his right to litigate his claim; and the effect of such disclosure to defeat the action must depend upon the degree to which the plaintiff is bound by the statement."

There is no reason why a plaintiff, in the proof of the first of these two propositions, should be limited to details of fact or evidence contained in the statement of his claim made to the company under the requirements of the contract. The real question between the parties arises more naturally in another way, that is, whether the plaintiff has furnished a sufficient statement or proof of his claim, in accordance with the contract, as a condition of his right to recover. If he has failed to do this he cannot maintain his action. Proof furnished at the trial will not take the place of proof required to be furnished before bringing an action. If in the essentials to be furnished, the statement is fatally defective, it is useless to try to maintain one's case by evidence offered in court.

Whether in the present state of the law, the doctrine declared in *Campbell* v. *Charter Oak Ins. Co.* 10 Allen, 213, should be held applicable to a part of the statement or proof of loss not required to be made, which, if true, would establish a fact that might be relied on as a defence, it is unnecessary now to decide. The proofs filed with the board of directors by the plaintiff in this case show no bar to the maintenance of the action, and the evidence was rightly admitted.

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The next question is whether the decision of the board of directors, that the proofs filed by the plaintiff were not satisfactory to them, leaves him without a right to recover. The defendant's contention is that the contract makes their decision conclusive. Under language like that used in this contract, this is not the rule of law. An accident insurance policy provided "that, before payment of the sum insured by any policy, proof satisfactory to the directors of the company should be furnished by the claimant of the death or accident," etc., and it was held in *Braunstein* v. *Accidental Death Ins. Co.* 1 B. & S. 782, 789, that this meant proof reasonably satisfactory, and that the board could not deprive the plaintiff of his right by unreasonably refusing to be satisfied. Similar decisions have been made in many cases. *Hawkins* v. *Graham*, 149 Mass. 284, 287. *Webber* v. *Cambridgeport Savings Bank*, 186 Mass. 314, 315. *Sloan* v. *Hayden*, 110 Mass. 141. *Lockwood Manuf. Co.* v. *Mason Regulator Co.* 183 Mass. 25, 26. *Charter Oak Ins. Co.* v. *Rodel*, 95 U. S. 232, 237. *Bowen* v. *National Life Assoc.* 63 Conn. 460, 473. The language in this contract is different in meaning from that under which one undertakes to do or furnish something to the satisfaction of the other party, into which considerations of taste or personal preference may enter. It calls for a result to be reached in a reasonable way, in accordance with a standard stated in words. There is an implication that the directors will act reasonably, and the requirement is the same as if the words "acting reasonably" were inserted, in connection with the words "said board."

The defendant contends that the proofs furnished by the plaintiff could not properly be found by the jury to be reasonably satisfactory, as a foundation for payment by the defendant. They were furnished upon forms established by the board of directors, as required by the contract, and all the questions were answered. They contained affirmative statements of all facts necessary to entitle the plaintiff to recover, namely, that he had suffered disability caused by external, violent and accidental means, which left an external, visible mark upon his body, and they showed the particulars of the disability. The only objection to the proofs is that, according to the contention of the defendant, they showed facts which relieved the defendant from liability, namely, that the injury was caused by the plain-

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tiff's voluntary exposure of himself to unnecessary danger, and that it was an injury which the plaintiff might have prevented by the exercise of ordinary care, or was an injury caused by disease. These matters are referred to in the contract as conditions whose existence will bar recovery. When a defendant relies upon such matters as a defence to a contract in this form, the burden of proof is upon him to establish the facts referred to in the conditions. *Freeman* v. *Travelers' Ins. Co.* 144 Mass. 572. *Badenfeld* v. *Massachusetts Accident Assoc.* 154 Mass. 77. *Keene* v. *New England Accident Assoc.* 161 Mass. 149. The plaintiff was not called upon in his proof of disability to negative the existence of such facts. *Cluff* v. *Mutual Benefit Ins. Co.* 99 Mass. 317, 324.

But even if the statement of such a fact might be fatal to his claim, which we do not intimate, we find nothing to justify the defendant's contention. The grounds for this contention are, that the circumstances of the accident, as detailed by the plaintiff and his two witnesses, Riley and Nugent, show a voluntary exposure to unnecessary danger, or negligence on his part, as matter of law, or that the injury was caused by disease and not by accident.

We are of opinion that the questions involved in this contention were all for the jury. The plaintiff, a man seventy-eight years of age, was on the platform of a railroad station, about to take a train which was entering the station. He walked forward on the platform, near the side of the train, before it stopped, with a view to take a forward car, when suddenly, without any apparent cause, "his right foot gave way," and he fell, coming in contact with the train, and his foot was crushed. Upon this description of the accident, it cannot be said as a matter of law that he was negligent. His foot had never before given way in a similar manner. So far as appears, the injury was entirely accidental. In this particular the judge could not rule that the accident prevented the plaintiff from recovering. *Badenfeld* v. *Massachusetts Accident Assoc.* 154 Mass. 77, 84. Nor can it be said, as a matter of law, that such a disorder as the sudden giving way of his foot, without apparent cause, was a disease within the meaning of the contract, such that the plaintiff is precluded from recovery for this reason. See *Manufacturers' Accident*

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Indemnity Co. v. *Dorgan*, 58 Fed. Rep. 945, a decision by the United States Circuit Court of Appeals, in which the meaning of a similar provision is discussed in the opinion by Judge Taft. See also *Winspear* v. *Accident Ins. Co.* 6 Q. B. D. 42; *Lawrence* v. *Accidental Ins. Co.* 7 Q. B. D. 216. There was no error in the refusal of the judge to give the instructions requested.

Exceptions overruled.

JOHN C. GRAY & another, trustees, *vs.* THOMAS J. KELLEY.

Norfolk. November 23, 1905. — January 4, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Witness, Examination. *Discretion of Court. Boundary. Adverse Possession. Evidence*, Declarations of deceased persons.

A presiding judge may in his discretion allow leading questions to be put to a witness on his direct examination.

It is a proper exercise of the discretion of a presiding judge to allow leading questions to be put on direct examination to a very aged witness whose recollection appears to have been exhausted by the general questions previously put to him.

In an action or proceeding where a boundary line is in dispute, a party who contends that his land extends to a certain stone wall, including a long triangle or wedge of land adjoining the wall claimed by him to have been acquired by adverse possession, there being evidence that the line fixed by the deeds is on one side of the wall at one end and on the other side at the other end, may show by a witness, who was employed to build the wall forty years before the trial by the predecessor in title of the opposing party, that he was ordered by his employer to throw out the three cornered piece and have the wall run straight as the boundary line, and that while building the wall he saw the predecessor in title of the party calling him as a witness, who said he was glad the wall was going to be built straight, and later said to him while he was building the wall, "Well, we will give and take. If there is any chance to give and take, we will give and take," the evidence being competent both at common law to show a boundary line assented to by the adjoining proprietors, each giving and taking land, in connection with evidence of subsequent occupation for more than twenty years in accordance with the line thus adopted, and also as a declaration of a deceased person under R. L. c. 175, § 66, showing the assent of the declarant to what was being done.

SHELDON, J. This is a petition for the registration of title to a triangular strip of land bounded on the north by a stone wall which is claimed by the petitioners to be wholly on their land; on the east by the petitioners' land; and on the south by land

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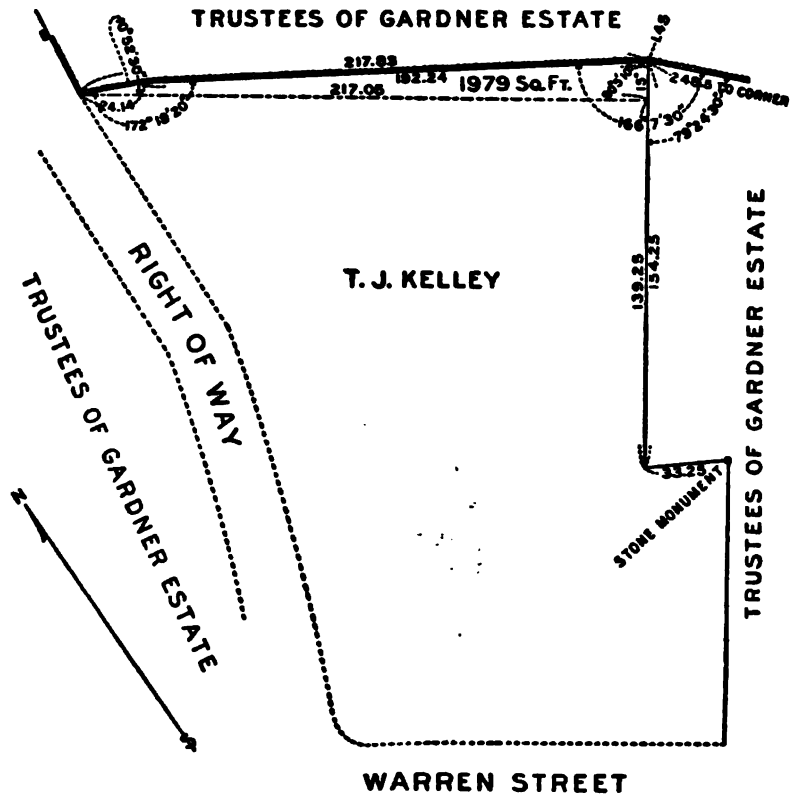
of the respondent. The westerly apex of the triangle is on the easterly side of a private way; and the triangle includes a strip of land running southeasterly from this apex something over two hundred and fourteen feet, and fifteen feet wide on its easterly side. This triangle and the surrounding land are shown on the following reduced copy of a plan annexed to the bill of exceptions.



The petitioners took their title under a deed from Simon Warren to John L. Gardner, dated June 7, 1862, which it is admitted conveyed the land lying on the north of the triangular strip in question; and the respondent derived his title under a deed from Louisa Warren to John W. Warren, dated March 1, 1856, which it is admitted conveyed the land lying south of this triangle. The petitioners contend that the premises conveyed by Simon Warren to Mr. Gardner included the whole of this triangle;

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but the respondent denies this, though admitting that they did include a large part of it. The respondent claims title to the strip by adverse possession of John W. Warren and his successors in title.

At the trial in the Superior Court, on appeal from the Land Court, four issues were submitted to the jury, as follows:

"First. Does the westerly end of the wall mentioned in the petition coincide with the westerly end of the boundary line between land of the petitioners and land of the respondent as shown by their respective record titles?

"Second. If the westerly end of said wall does not coincide with the westerly end of said boundary line, how far is the westerly end of said wall north or south of the westerly end of the boundary line between land of the petitioners and land of the respondent as shown by their respective record titles measuring on the easterly line of the passageway mentioned in the petition?

"Third. Have John W. Warren and his successors in title used and occupied the whole or any part of the land described in the petition openly, and not permissively, but adversely, exclusively and under claim of right, continuously for more than twenty years without a break, or an abandonment of, or a withdrawal from such possession, and without interruption or interference by John L. Gardner or his successors in title?

"Fourth. If the whole or any part of said land has [not] been so used and occupied, how much of said land has been so used and occupied?"

The jury answered the first issue "No," and the third "Yes." In answer to the second and fourth issues they found that the westerly end of the stone wall was four feet south of the boundary line as shown by the record titles, and that the adverse possession mentioned in the third issue included the whole of the land in dispute; and the case now comes before us on the petitioners' exception to the admission of certain evidence offered by the respondent.

A witness called by the respondent testified that over forty years ago, while employed by Mr. Gardner, under whom the petitioners took their title, he built this wall under orders from Mr. Gardner, who told him to throw out the three cornered

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piece and have the wall run straight as the boundary line. He then testified that while building this wall he saw John W. Warren, who then owned the respondent's land, "right in front of where this wall was built," and that Mr. Warren said he was glad the wall was going to be built straight. He further testified, under the petitioners' exception, that when they were talking one day about the line and when they were building the wall, Mr. Warren said, "Well, we will give and take. If there is any chance to give and take, we will give and take." Mr. Warren was dead at the time of the trial.

The petitioners' first ground of objection was that this testimony was given in answer to leading questions. But the witness was a very aged man, and his recollection appeared to have been exhausted by the general questions which had been previously put. Moreover the presiding judge had the right, in his discretion, to allow leading questions to be put, even in direct examination. *Commonwealth* v. *Meserve*, 154 Mass. 64, 68.

It is also argued that this testimony was irrelevant because it merely expressed Mr. Warren's willingness or desire to exchange in the future and had no tendency to show that subsequently an actual exchange was made. But we think that the jury had a right to find that the words "we will give and take" did not refer to any exchange to be made in the future, but expressed a present willingness to adopt the exchange offered by Mr. Gardner in building this wall as the boundary line in such a location as, if it were adopted, would bring about an exchange of land at one end of the wall for land at its other end, as the jury by their answers to the first and second issues have found was the case. If Mr. Gardner did build the wall in such a situation as to produce this result, and if Mr. Warren did express a present assent to the means adopted, so that each actually assented to a parol gift to the other of such portion of his own land as lay on the other's side of the new boundary line thus adopted, it is of course true that no title would pass by the mere force of such an agreement. *Iverson* v. *Swan*, 169 Mass. 582. *Hall* v. *Eaton*, 139 Mass. 217. *Proctor* v. *Putnam Machine Co.* 137 Mass. 159, 162. *Proprietors of Liverpool Wharf* v. *Prescott*, 7 Allen, 494. But an occupation according to the line thus adopted, if adverse and under a claim of right, and if

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sufficiently long continued, would effect a change of title. *Proctor* v. *Putnam Machine Co.*, *ubi supra*. *Beckman* v. *Davidson*, 162 Mass. 347, 450. *Wheeler* v. *Laird*, 147 Mass. 421.

Accordingly we think that this testimony was competent to show the condition at that time of Mr. Warren's mind; that he then understood that the situation of this wall as Mr. Gardner was building it did not coincide with the boundary line as fixed by the deeds; that he assented to its being so built, and that by adopting it as the boundary between the parties he and Mr. Gardner were giving and taking land accordingly. *Inness* v. *Boston, Revere Beach & Lynn Railroad*, 168 Mass. 433. *Commonwealth* v. *Crowley*, 165 Mass. 569. *Sturbridge* v. *Franklin*, 160 Mass. 149, 151, 152. *Commonwealth* v. *Trefethen*, 157 Mass. 180. *Motte* v. *Alger*, 15 Gray, 322. *Ashley* v. *Ashley*, 4 Gray, 197.

We think also that evidence of these statements was competent under R. L. c. 175, § 66, Mr. Warren being dead. The presiding judge had a right to find that the statements were not declarations as to something to be done in the future, but that they indicated his present consent to what was being done and to the giving and taking of land that naturally followed therefrom; that they were made in good faith and upon personal knowledge before the action on trial was begun. This was enough to warrant the admission. *George* v. *George*, 186 Mass. 75. *Stone* v. *Commonwealth*, 181 Mass. 438.

The other exception taken by the petitioners was not insisted upon at the argument.

Exceptions overruled.

R. A. Jackson, for the petitioners.

W. H. White & T. W. Proctor, for the defendant, were not called upon.

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GEORGE B. HASKELL *vs.* BOSTON DISTRICT MESSENGER COMPANY.

Suffolk. November 23, 1905. — January 4, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Negligence. Carrier. District Messenger Company.

A corporation supplying messenger boys to be used in ordinary messenger service and controlled by those calling for them is not a common carrier, and performs its duty toward its customers by exercising ordinary care in the selection and employment of suitable persons as messengers.

If in response to a signal from a call box a corporation supplying messenger boys to carry messages and do errands furnishes a boy, who is sent by the person calling for him with a receipted bill to collect rent and collects the rent and disappears with it, and no special arrangement has been made with the company in regard to the performance of this service, the employer of the boy cannot recover the amount of his loss from the corporation supplying him, without showing negligence on the part of the corporation in selecting the boy as a messenger.

In an action against a corporation supplying messenger boys to carry messages and do errands, for the loss of a sum of money stolen by a messenger supplied by the defendant when sent by the plaintiff to collect rent, it is proper to exclude evidence, offered by the plaintiff to show knowledge on the part of the defendant that the employers of its messengers sometimes entrusted them with money.

CONTRACT, with a count in tort, against a corporation, established under the laws of the State of New Hampshire and having a usual place of business in Boston, engaged in carrying on in that city and its vicinity the business of supplying messengers for hire, and alleged to be a common carrier of messages, packages, money and other things, alleging in the first count the loss of $58.33 received from the plaintiff by a messenger furnished by the defendant to whom the plaintiff entrusted a rent bill for collection, and alleging in the second count the loss of the same money through the negligence of the defendant in conducting its business. Writ dated October 24, 1902.

At the trial in the Superior Court before *Wait*, J. the facts appeared which are stated in the opinion. The evidence referred to in the last paragraph of the opinion as properly excluded by the judge was as follows:

One Johnson, called for the plaintiff, testified that he was in

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the employ of the defendant about two years in 1897 and 1898 as a messenger; that he did various kinds of business, including depositing money in banks, drawing money, collecting rents and paying bills; that during the first two weeks of every month he would carry money for the plaintiff very often. The witness further testified that he collected money for other customers of the defendant and deposited money for them in banks.

On direct examination the witness was asked the following questions:

"Q. Now, I want to ask you a question that you need not answer until we see whether it is objectionable, and that is: During the period of time that you were in the employ of the defendant company, was it or was it not a matter of common talk and knowledge that messengers collected money in response to calls from the customers?

"Q. Was the collection of money by the messenger known to the officers or any of the managers of the company in the office?"

To each of these questions the defendant objected. The objections were sustained and the plaintiff excepted.

One Brothers, called for the plaintiff, testified that he entered the service of the defendant fourteen years ago, first a year as messenger, and then as clerk and branch office manager, and as collector for both the defendant company and the Postal Telegraph Company. The witness was asked this question:

"Q. At that time (when the witness was in charge of the messenger service at Atlantic Avenue in 1898), what did you know in respect to any habit or usage in respect to any messenger boys collecting money?" The defendant objected. The objection was sustained and the plaintiff excepted.

The witness was asked this question:

"Q. Was it a usual or an unusual occurrence for the messengers to carry money the last two years you were in the service of the company?" To which the witness answered, "Oh, it was the usual messenger service."

The witness then was asked, "Was it so regarded by the company?" To this question the defendant objected. The objection was sustained and the plaintiff excepted. The witness then was asked, "By the officers of the company?" To

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this question the defendant's attorney objected. The objection was sustained and the plaintiff excepted.

No notice was given by the company to the public that its messengers were not permitted to carry money for its patrons. Brothers testified that if there was any special or unusual service demanded by a customer he would confer with the superintendent of the company and obtain his approval before sending a messenger.

At the close of the evidence, the judge instructed the jury as follows: "In the view which I take of the law applicable to the evidence here, it seems to me that it is my duty to direct that you find a verdict for the defendant, on the ground that there is no liability for goods placed in the hands of a messenger; that the risk attending the loss of the goods belongs to the person who sends the goods and puts them in the hands of the messenger, and not upon the company which furnishes the messenger; and I will ask your foreman to sign a verdict."

In accordance with this direction the jury returned a verdict for the defendant; and the plaintiff alleged exceptions.

W. A. Abbott, for the plaintiff.

R. F. Sturgis, for the defendant.

KNOWLTON, C. J. The defendant is a corporation, organized under the laws of New Hampshire for the purpose of "carrying on a general messenger business, leasing, operating, erecting and maintaining wires and fixtures for call boxes, telegraphs and other things relating to and useful in the receiving and transmitting and delivery of messages." For many years it has had a general office and branch offices in the city of Boston, and has been engaged in the business of furnishing messengers for hire. The ordinary method of doing the business has been for the company to send a messenger in response to a call, and to send with him a printed slip, with blank spaces for filling in the "Time started," "Name," "Address," "Messenger occupied" (Time), "Expenses" (Paid), "Total," "Messenger detained" (Minutes), "By" (Name of person employing messenger). There were other blanks to be filled, to show where the messenger was sent, by whom the message was received, where the answer was delivered, and by whom it was received. An advertising pamphlet, issued by the defendant, gave the rates of charges for a messen-

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ger between specified points in all parts of Boston, and also rates by the hour. At the bottom of one of its pages was a printed statement, "We employ bright, intelligent boys who are thoroughly experienced in messenger work." The rates stated are all without reference to the nature or importance of the work in which the particular messenger may be employed. The pamphlet contained numerous other advertising statements, all of which implied that the business done by the company was only in furnishing messengers for the service of others, except that at the bottom of one page there was this statement: "We deliver addressed circular work, bills, monthly statements, catalogues, calendars, etc. Get our prices." It also appeared that for several years, shortly before Christmas, the defendant had distributed a card, saying that it made a specialty of delivering Christmas presents. In carrying on its business the defendant employed boys fifteen or sixteen years of age.

The plaintiff signalled to the defendant for a messenger by means of a call box, and delivered to the messenger sent in response to his call, a receipted bill for rent, amounting to $58.33, and sent him to a tenant to collect it. The messenger collected the money and failed to return it. The question is whether there was any evidence at the trial which would warrant the jury in finding for the plaintiff for the amount of this money which he seeks to recover.

The plaintiff contends that the defendant acted as a common carrier in receiving the bill and undertaking to bring back the money. We find nothing in the evidence tending to show this. It undertook to furnish messengers to be used by its employers in any way in which messengers could properly be employed. If special and peculiar service was wanted special arrangements were to be made for it. In the ordinary conduct of its business the defendant did not assume any control of the work in which the messengers were to be employed, and usually had no knowledge of it until after it was completed. Even then it had no knowledge of the nature of the message delivered, or the particulars of the service. The employer was left to direct the messenger, to determine what he should do and how he should do it, subject only to an implied understanding that he should not be called upon to render service of a different kind from

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that which can properly be performed by messengers. In this service the messenger became, for the time, a servant of the employer, while he was still in the general service of the defendant. *Linnehan* v. *Rollins*, 137 Mass. 123. *Hasty* v. *Sears*, 157 Mass. 123. *Samuelian* v. *American Tool & Machine Co.* 168 Mass. 12. *Delory* v. *Blodgett*, 185 Mass. 126.

It was shown that messengers had often been entrusted with money and property by those who called them. So far as appears, this was under the general arrangement already stated, which gave the defendant no knowledge nor any responsibility in regard to the way in which the messenger was used. The evidence tended to show that some of the agents of the company, and perhaps the general manager of the company, knew that sometimes messengers were so used. But this creates no liability for the money or property, so long as the messengers were furnished only to be used and controlled by the employer as he might choose.

What is the implied contract or duty of the defendant, growing out of this kind of business? Does the defendant become a common carrier and insurer of everything entrusted to the messengers? It seems quite plain that it does not. It impliedly contracts that the messengers whom it furnishes are suitable and proper persons for the performance of the ordinary duties of messengers, so far as the exercise of ordinary care in the selection and employment of them will enable it to procure such persons. Its duty is not very unlike that of a stable keeper who furnishes a horse and carriage for the use of a hirer. Because, for the proper performance of their duties, these messengers should be worthy of confidence, ordinary care in the selection of them requires that investigation should be made and precautions be taken to insure the exclusion of all unfit persons from this employment, and to secure persons of such mental and moral qualifications as render them trustworthy. For a failure to take due precautions in these particulars the defendant may be held liable, either for negligence or upon an implied contract, to any person who suffers loss from the misconduct of a messenger whom it has furnished. In the present case there was no evidence of negligence of the defendant in this particular.

If, in the delivery of Christmas presents, or of bills, state-

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ments, catalogues, etc. the defendant becomes a common carrier, it is liable as such. But that can be only by an arrangement different from that made with this plaintiff.

The exceptions in regard to the exclusion of evidence must be overruled. None of the testimony excluded had any tendency to show that the defendant became liable as a common carrier for money or property entrusted to messengers under ordinary arrangements like that made with the plaintiff. Mere knowledge that employers sometimes entrusted money to them, without any contract other than the usual one, under which the messenger is furnished to be used by the employer in the ordinary way, would not make the defendant liable for loss of money, through his dishonesty, unless there was a failure to use proper care in the selection of the messengers.

Exceptions overruled.

ANNIE DAVIES *vs.* CITY OF BOSTON.

Suffolk. November 24, 1905. — January 4, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Municipal Corporations. Boston. East Boston Ferry. Carrier.

The city of Boston in operating a ferry with established tolls for the transportation of passengers between the mainland of that city and East Boston under St. 1869, c. 155, is liable as a common carrier to a passenger on a ferryboat owned and operated by it who is injured through the negligence of one of its servants, and the fact that the business of operating the ferry is managed in such a way as not to be profitable to the city is immaterial.

TORT, with a count in contract, for personal injuries sustained by the plaintiff while a passenger on a ferryboat owned and operated by the city of Boston, running between the mainland of that city and East Boston, the plaintiff having paid the regular fare of one cent. Writ dated March 18, 1903.

At the trial in the Superior Court before *Lawton*, J. there was evidence which warranted the jury in finding that the plaintiff while in the exercise of due care was injured by reason of the negligence of one of the defendant's employees in raising

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a gate to permit the passengers to go ashore. This gate was attached to and worked upon a post set upright in the deck near the end of the boat. When lowered it extended across the space traversed by passengers when going on board or going ashore. It was kept raised when they were boarding or leaving the boat, and kept lowered when the boat was making its trip. The accident occurred just after the boat had been made fast on the Boston side at what is known as the North Ferry, when the gate was being raised to permit the passengers to go ashore.

At the close of the evidence the defendant asked the judge to rule as follows:

1. Upon all the evidence a verdict should be directed for the defendant.

2. The city of Boston is not liable to a passenger for injuries sustained by him on a ferryboat of the defendant city plying between the mainland of the city of Boston and the island of East Boston by reason of the negligence of its employees on the boat.

The judge refused to rule as requested, and instructed the jury that the city of Boston was running a ferryboat and was liable as a common carrier of passengers, owing to the plaintiff the same duty it owed to all its passengers to exercise toward them the highest degree of care possible consistent with its undertaking.

The jury returned a verdict for the plaintiff in the sum of $700; and the defendant alleged exceptions.

P. Nichols, for the defendant.

C. H. Stebbins, for the plaintiff.

KNOWLTON, C. J. The plaintiff, while a passenger on a ferryboat used by the defendant to carry passengers from East Boston to Boston, was injured by the negligence of one of the defendant's servants. The only question raised by the bill of exceptions is whether the defendant is liable for such an injury.

The defendant contends that its relation to the plaintiff was simply that of an agent of the public, performing strictly public duties, with no commercial element entering into the business in which it was engaged, whether the business is viewed in reference to the plaintiff who paid fare for her passage, or in reference

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to other aspects of the case. The plaintiff contends that the defendant was a common carrier of passengers for hire, and that whatever elements of public interest entered into the service which it was rendering, there was also a commercial element in it which made the defendant answerable upon its contracts with passengers, and liable for damages caused by the negligence of its servants.

Under the St. 1869, c. 155, the city of Boston purchased of the East Boston Ferry Company, its boats, franchises and other property, and since the purchase it has maintained a ferry with established tolls, for the transportation of passengers. Under the franchise granted by the original act of incorporation, the East Boston Ferry Company was a common carrier of passengers. St. 1852, c. 244, § 2. After the purchase the defendant succeeded to this franchise, and in maintaining and operating the ferry it became a common carrier. St. 1869, c. 155, § 1. The terms of the authority to maintain the ferry, given by this section, are as follows: "in such manner and upon such rates of ferriage as the board of aldermen of said city shall from time to time judge the best interests of the said city to require, excepting only as hereinafter provided." The later provisions of the chapter here referred to are three: first, a provision authorizing the city to maintain the ferry free of tolls if it should think it for its best interests so to do; secondly, a provision permitting it to maintain the ferry under § 5, with greater accommodations and with toll for foot passengers at half the former rate, and with other rates so reduced that the receipts of the ferry annually should not exceed the cost of operating it; and thirdly, under § 6, an authority to maintain it free from tolls for a term of not less than ten years after the purchase, and then upon such rates of toll as should conform to the requirements of § 5. See *Attorney General* v. *Boston*, 123 Mass. 460, 465. The statute provided for an assessment of betterments upon estates specially benefited, if the city adopted either of these three schemes whereby there would be a reduction of tolls. The city did not think its best interests required the adoption of either of them, but proceeded under § 1, without a reduction of tolls for foot passengers for more than seventeen years. Under this section there was no limitation upon the tolls that it might charge, the

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whole matter being left to the board of aldermen, to fix the rates as they deemed best. There was also a special provision in § 7, allowing the board of aldermen, even if one of the three schemes above mentioned was adopted, to collect such rates of ferriage as they should judge expedient for teams and vehicles passing over the ferry to or from any place beyond the limits of Boston.

In exercising its franchise under this statute the city has not only been acting in the public interest, but it has been engaged in a business into which a commercial element entered. It furnished the privileges of the ferry for pay to those who used it. As the enterprise was partly commercial in its character, for the purpose of furnishing conveniences to those who would pay for them, the city may be held like any private individual or corporation engaged in a like enterprise. *Oliver* v. *Worcester*, 102 Mass. 489. *Worden* v. *New Bedford*, 131 Mass. 23. *Little* v. *Holyoke*, 177 Mass. 114. *Neff* v. *Wellesley*, 148 Mass. 487. For many years the rate of toll for foot passengers was the same as previously had been charged by the private corporation. The fact that the business, as managed, was not profitable to the city does not change its character. The relation of the city to a passenger on the ferry was similar to that of the East Boston Ferry Company when it owned the ferry. In an important sense the ferry was maintained before and after the purchase for a public purpose, just as great highways through the country are maintained by railroad corporations for a public purpose which calls for the exercise of the right of eminent domain. But there is a pecuniary and commercial interest involved in the business, which takes form in the contracts made between carriers and passengers, and in other ways.

The maintenance of the ferry under this statute is not unlike the maintenance of waterworks by cities and towns. This is justified in its requirement of taxation on the ground that the works are established in the interest of the public. But the dealings of cities and towns with individual water takers are held to create enforceable contracts, and to impose duties, for the neglect of which municipalities are liable. *Merrimack River Savings Bank* v. *Lowell*, 152 Mass. 556. *Stock* v. *Boston*, 149 Mass. 410. So too they are liable for negligence in the performance

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of their duties as to construction or maintenance. *Lynch* v. *Springfield*, 174 Mass. 430, 431, and cases cited. *Fox* v. *Chelsea*, 171 Mass. 297.

Although the construction and maintenance of sewers is chiefly in the public interest, it has long been held that a commercial element is involved, which creates a liability in cities and towns for negligence in the performance of the work. *Coan* v. *Marlborough*, 164 Mass. 206, 208, and cases cited.

In *Attorney General* v. *Boston*, 123 Mass. 460, there was much discussion of the question whether that part of the St. 1869, c. 155, which purports to authorize the city to maintain a free ferry at the expense of the taxpayers, is constitutional. The court, on page 469, says that it is unnecessary to decide the question, since the city had never acted under that part of the statute, but had only maintained a ferry with a payment of tolls. This was equivalent to holding that the business in which the city was engaged involved a payment by individuals for the service rendered, which would leave the parties to the contract with the ordinary rights and liabilities of parties to similar contracts.

The city has repeatedly been held liable in cases like the present, although the court has never passed directly upon the question now raised, because it has never before been presented. *Peverly* v. *Boston*, 136 Mass. 366. *Rosen* v. *Boston*, 187 Mass. 245. *Townsend* v. *Boston*, 187 Mass. 283. In the last of these cases it was admitted by the defendant that the city was a common carrier of passengers across the ferry, and the court said, referring to the St. 1869, c. 155, "Under this statute the city could maintain and operate a ferry, in part for profit, and be subject to all the liabilities of a common carrier, although there is alternative authority to use it otherwise."

We are of opinion that the defendant is liable as a common carrier of passengers.

Exceptions overruled.

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GEORGE N. PIERCE COMPANY *vs.* ALBERT M. BEERS.

Suffolk. December 12, 1905. — January 4, 1906.

Present. KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Practice, Civil. Agency. Damages. Waiver.

Where in an action of contract the defendant does not demur to the declaration but proceeds in a hearing before an auditor until all the evidence has been put in before objecting that the declaration sets forth no cause of action, he has waived that objection, and, if facts have been proved sufficient to establish a cause of action, it is too late for him to ask for such a ruling at the trial.

If one of the salesmen employed in a wholesale and retail store of a manufacturer makes retail sales to himself at a lower price than that authorized by his employer under the false pretence that the sales are made to a wholesale agent of his employer, he is liable to his employer for the difference between the price received by the employer and the retail market value of the goods at the time of each sale.

In an action by a manufacturer against one of its salesmen for wrongfully making sales to himself at a lower price than that authorized by the plaintiff under the false pretence that the sales were made to a wholesale agent of the plaintiff, it is no defence that the defendant made the sales outside his working hours.

There can be no waiver without knowledge of the thing waived.

CONTRACT, with counts in tort, by a corporation manufacturing bicycles against one of its salesmen. Writ dated June 8, 1898.

The declaration was as follows:

First count: On or about the fifteenth day of December, 1896, the plaintiff and the defendant entered into a contract whereby, in consideration that the plaintiff would employ the defendant as a salesman for the goods manufactured and sold by the plaintiff, the defendant agreed with the plaintiff to enter such employment and to serve the plaintiff faithfully therein, and to sell the goods of the plaintiff at such prices and on such terms and conditions as the plaintiff should prescribe. And thereafter the defendant entered the employ of the plaintiff and sold for the plaintiff divers bicycles manufactured by the plaintiff, and it became the duty of the defendant in accordance with his promise to sell the bicycles at the prices established by the plaintiff, but the defendant, disregarding his promise, from time to time,

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and at divers times from the fifteenth day of December, 1896, to the date of the writ, sold sundry bicycles at prices less than the prices at which the defendant was instructed and was authorized to sell the bicycles; and by the several breaches of the contract by the defendant the plaintiff has suffered damage.

Second count: The plaintiff is a corporation engaged in the business of manufacturing and selling bicycles and goods and merchandise pertaining to bicycles, and on or about the fifteenth day of December, 1896, the defendant entered the employ of the plaintiff as a salesman and it thereupon became the duty of the defendant to serve the plaintiff faithfully, and among other things to sell the bicycles and other goods of the plaintiff at such prices as the plaintiff should from time to time prescribe and to account for and pay to the plaintiff the sums of money received from such sales. The plaintiff duly instructed the defendant to sell the bicycles at certain retail prices, and thereupon it became incumbent upon the defendant to sell the bicycles at such prices, but the defendant, disregarding his duty to the plaintiff, from time to time and at divers times from the fifteenth day of December, 1896, to the date of the writ, fraudulently and with desire to appropriate to himself moneys obtained from the sale of the bicycles, sold from time to time divers bicycles at prices less than the prices prescribed by the plaintiff, and did not account and pay over to the plaintiff the retail prices thereof; wherefore by the several wrongful acts of the defendant the plaintiff has been greatly damaged.

Third count: And the defendant has converted to his own use sundry bicycles, the property of the plaintiff mentioned in the schedule hereto annexed.

Fourth count: And the defendant owes the plaintiff the sum of $1,494.20, money had and received by the defendant for the plaintiff's use, according to the bill of particulars hereto annexed, together with interest on the several items.

Fifth count: The defendant owes the plaintiff the amount of $1,494.20, according to the account annexed, together with interest on the several items thereof.

The defendant's answer was a general denial. The case was referred to an auditor, who under the first and second counts found in favor of the plaintiff in the sum of $1,441.91, with

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interest from the date of the writ. In the Superior Court the case was tried before *Wait*, J. It appeared that the plaintiff during the period covered by the declaration was a manufacturer of bicycles having a store at Boston in charge of a manager named Cannon. At this store bicycles were sold both at wholesale and at retail. The sales at retail were ordinary sales of single wheels. The sales at wholesale were to persons designated as sub-agents who were in fact bicycle dealers having places of business in adjoining cities and towns. The plaintiff appointed as sub-agents only persons who would agree to purchase a certain number of bicycles from the plaintiff. The wholesale prices were considerably lower than the retail prices, and all prices were fixed by the plaintiff, and were changed from time to time during the season. The salesmen at the store in Boston sold wheels both at wholesale and at retail at the prices established from time to time by the plaintiff. Sales to sub-agents of single bicycles were treated as wholesale transactions and the prices at which single wheels were sold to regularly appointed sub-agents were the wholesale prices.

The defendant was one of several salesmen employed by the plaintiff at its Boston store. His salary was $20 a week. By his efforts one Warren of Everett was made a regular sub-agent of the plaintiff. The defendant agreed with Warren to help Warren to sell the bicycles that Warren was obliged to purchase from the plaintiff in order to become a sub-agent, by selling wheels himself that should be turned in to the plaintiff as sales to Warren. The defendant sold bicycles at prices not less than the wholesale prices, and frequently considerably above the wholesale prices, turned in to the plaintiff's office sales slips describing the sales as sales made by the plaintiff to Warren at wholesale prices, keeping for himself all that he received above the wholesale prices. The plaintiff allowed a discount of two per cent for cash on sales to sub-agents, and this two per cent discount was in every case retained by the defendant. The defendant hired a postoffice box at Everett in Warren's name, paid for it himself, had the only key to the box, and directed the plaintiff to send Warren's bills to this box, where the defendant obtained them.

The plaintiff knew nothing of the arrangement between War-

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ren and the defendant before the date of the writ, and supposed that the sales turned in by the defendant as sales of the plaintiff to Warren were actual sales to Warren. Warren himself sold a few wheels, fifteen or twenty.

The defendant asked the judge to rule:

1. That the first count of the declaration does not set out any legal cause of action against the defendant.

2. That the second count of the declaration does not set out any legal cause of action against the defendant.

3. That as to each the first and second counts, there is not sufficient evidence to warrant a finding thereon for the plaintiff.

4. That as to each the first and second counts, there is not sufficient evidence to warrant a finding for more than nominal damages.

5. That, upon the evidence, the relation between the plaintiff and the defendant was that of master and servant.

6. That, if the relation between the plaintiff and the defendant was that of master and servant, the defendant owed no duty to the plaintiff outside of the hours of his employment.

7. That if the jury find that the defendant was buying and selling on his own account in the name of Warren, and that this business was carried on by him in his own time, and not during the hours the plaintiff was entitled to his services, no breach of his contract of employment with the plaintiff would be thereby committed.

8. That to entitle the plaintiff to recover against the defendant, it must appear that the sales made by the defendant were made during the hours of his employment with the plaintiff.

9. That if the defendant, without the knowledge of the plaintiff, was the purchaser, in the name of Warren, from the plaintiff, of the bicycles in question, no right of action would thereby accrue to the plaintiff except upon the rescission of the several contracts of purchase.

10. That if the jury find that the plaintiff believed it was selling the several bicycles mentioned in the declaration to Warren, and intended to part with the property therein at the prices at which the respective bicycles were charged to Warren, and it appeared that the defendant without the knowledge of the plaintiff was the actual purchaser in the name of Warren, the

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plaintiff would not thereby suffer any pecuniary damage for which the defendant would be liable.

11. That if the plaintiff has any remedy against the defendant, it must be set out or declared for by a special count upon each transaction.

The judge refused these requests for rulings, except that he ruled in accordance with the fifth request that the relation between the plaintiff and the defendant was that of master and servant, and the defendant excepted.

At the request of the plaintiff the judge ruled:

1. The plaintiff is entitled to recover the difference between the net retail market price on each bicycle described in the account annexed to the declaration which was sold by the defendant without the authority of the plaintiff and the amount paid to the plaintiff by the defendant therefor.

2. The fact, if it be a fact, that certain persons bought bicycles from the defendant, who would not have bought Pierce wheels at the regular retail prices, is immaterial in determining the plaintiff's damages.

3. The fact, if it be a fact, that the plaintiff or its agents approved certain sales made by the defendant, does not amount to a ratification of those sales, if the approval was given in ignorance of the facts, if they be facts, that the defendant made the sales in question without the authority of the plaintiff.

4. The market values of single new Pierce bicycles in Boston during the years 1897 and 1898 were the prices, if any, at which such bicycles were commonly sold singly at Boston or its vicinity, during the years 1897 and 1898.

To each of these rulings the defendant excepted.

After these rulings and refusals to rule, the defendant's counsel said he saw no question for the jury, and the judge ordered a verdict for the plaintiff upon the first and second counts of the declaration for the net retail market price on each bicycle described in the account annexed to the declaration which was sold by the defendant without the authority of the plaintiff less the amount paid to the plaintiff by the defendant therefor with interest from the date of the writ, which sum by agreement of the parties was fixed at the amount found by the auditor, namely, $1,966.75.

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The defendant alleged exceptions.

W. C. Cogswell, for the defendant.

J. B. Studley, for the plaintiff.

SHELDON, J. The defendant's answer to the plaintiff's declaration was a general denial. The case was referred to an auditor, who heard evidence offered by both parties and made a report. At the trial in the Superior Court, after the pleadings were read, the defendant asked the judge to rule that neither the first nor the second count of the declaration set out any cause of action against the defendant or assigned any breach by him of any contract; and the first question that comes before us is raised by the defendant's exception to the refusal of the judge so to rule. The auditor states in his report that the defendant made these objections before him, but only after all the evidence was put in.

The defendant now makes certain specific objections to the sufficiency of the averments of these counts, which might call for attention if they had been taken by a demurrer setting them out, though we do not mean to intimate that such a demurrer, if made, would have been sustained. But we think that he had waived these objections by going to trial without raising them on the record. *Preston* v. *Neale*, 12 Gray, 222. It is well settled that such objections should be taken by demurrer; and where this has not been done, it is sufficient if there are facts enough proved at the trial to establish a cause of action which has been defectively stated in the declaration. *Foster* v. *Leach*, 160 Mass. 418. *Downs* v. *Hawley*, 112 Mass. 237. *Shattuck* v. *Marcus*, 182 Mass. 572. The defendant's exceptions to the refusal to give the first, second and eleventh instructions asked for by him must be overruled.

The defendant also argues that there was not sufficient evidence to warrant a finding for the plaintiff on the first and second counts upon which the verdict for the plaintiff was rendered. But we think that the facts found by the auditor sufficiently show a breach of the duty owed by the defendant to the plaintiff as his employer; and it was correctly ruled that the measure of damages under these counts was the difference between the price received for each item by the plaintiff and the market value of the wheel at Boston at the time of sale; and

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the finding that the net retail price represented that market value was one which the auditor was warranted in making as between these parties. Nor can it be said that the successive wrongful sales made by the defendant were respectively waived by the plaintiff by continuing to employ him, as the defendant contends, relying on *Forbes* v. *Appleyard*, 181 Mass. 354; for the auditor has found that these transactions of the defendant were unknown to the plaintiff, and that he was discharged as soon as they were discovered. The real fact, as found by the auditor, is that the defendant wrongfully made all these sales to himself at a smaller price than that for which he was allowed to make them, under the false pretence that they were really made to a wholesale agent of the plaintiff, and thereby procured and induced the plaintiff to receive in payment the smaller prices for which it would have sold them to the wholesale agent if he had been really the purchaser. It would be a reproach to the law if it could afford no remedy for such misconduct. The case comes within the rule that an agent to sell cannot himself purchase. *Goodell* v. *Goodell*, 173 Mass. 140, 146. *Commonwealth* v. *Cooper*, 130 Mass. 285. *Smith* v. *Townsend*, 109 Mass. 500, 502. *Farnsworth* v. *Hemmer*, 1 Allen, 494. *Copeland* v. *Mercantile Ins. Co.* 6 Pick. 198, 203. This is especially true where the agent undertakes to make more advantageous terms for his own benefit by pretending that the sale is really made to one to whom the seller is willing, for special reasons, to give those terms. And as to the measure of damages there was nothing to control the auditor's finding. The defendant's exceptions to the refusal to give the third, fourth, ninth and tenth instructions asked for by him must be overruled.

Nor can it make any difference that some of the sales in question were made by the defendant outside his working hours. The sales were none the less sales made in reality to himself instead of being made to others, and none the less made under the false pretence which we have stated and for a smaller price than that for which he had the right to make them. His liability for this actual misfeasance does not depend upon the time or place of the misfeasance. It operated as an obtaining of the plaintiff's goods by means of false pretences at a less price than he was entitled to obtain them. The fact that one is employed

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by a merchant to render services during business hours cannot give him any license to defraud his employer in the evenings or on holidays. Accordingly his sixth, seventh and eighth requests for rulings were rightly refused.

His fifth request was given.

It follows from what we already have said that the rulings made at the request of the plaintiff were made properly; and as the defendant, upon the rulings made and refused, did not desire to go to the jury, he cannot complain of the action of the judge in ordering a verdict for the amount found by the auditor in favor of the plaintiff upon the first and second counts.

Exceptions overruled.

CHARLES COLLINS *vs.* JOHN P. WISE & another.

Suffolk. December 13, 1905. — January 4, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Assault and Battery. Master and Servant. Practice, Civil, Verdict.

In an action for injuries from an assault and battery alleged to have been committed by a servant of the defendant, if the plaintiff's evidence tends to show the commission of an assault by a person in the employ of the defendant at a time when he was not acting within the scope of his employment, but the defendant's evidence tends to show that the assault was committed by the servant in the protection of his master's property under circumstances entirely different from those testified to by the plaintiff, a verdict for the plaintiff may be supported on the ground that the jury adopted the defendant's theory of the assault and found that the servant used more force than was necessary for his lawful purpose.

TORT for injuries from an assault and battery alleged to have been committed by a servant of the defendants, as described in the opinion. Writ in the Municipal Court of the City of Boston dated September 28, 1903.

On appeal to the Superior Court the case was tried before *Bell*, J. The jury returned a verdict for the plaintiff in the sum of $200; and the defendants alleged exceptions.

J. W. Converse, for the defendants.

A. J. Connell, (*J. M. Sullivan* with him,) for the plaintiff.

SHELDON, J. This was an action to recover damages for an

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assault committed upon the plaintiff by a bartender employed by the defendants in their store. The plaintiff testified that about half-past six o'clock in the evening he went to the defendants' store, bought and drank a glass of beer, obtained from a bartender a key to a water closet, which he used, and left the store; that about half an hour later he returned to the store to use the closet, and asked one Sullivan, another bartender, for this key, who refused to let him have it; that after some talk he told Sullivan that he had used the closet a little while ago, and then Sullivan came out from behind the bar and said to the plaintiff, "You are the fellow that used it, are you?" and committed the assault complained of. There was also evidence that Sullivan had heard that this closet had been defiled. The defendants' testimony tended to show that Sullivan was employed only as a bartender to take, prepare and serve orders for drinks, and collect pay for them, and had no authority to eject people from the premises, and nothing to do with maintaining order therein or with keeping them clean; that he had got through work at six o'clock in the afternoon and had left the store, but returned about seven o'clock in the evening merely to go to this closet; that on his coming out of the closet the plaintiff attempted to take the key from him by force, and he simply resisted this attempt by such force as was necessary, and did not strike or kick the plaintiff at all.

The defendants asked the judge to give several instructions to the jury, all of which were given in substance except the first, that there was no evidence in the case showing liability of the defendants, and the verdict must be for them. The judge left the question to the jury whether, if an assault was committed, it was done by Sullivan in the discharge or attempted discharge of a duty imposed upon him by the defendants, and instructed them that if in the exercise of any such duty Sullivan unjustifiably assaulted the plaintiff, or in the exercise of self defence exceeded the reasonable amount of force necessary therefor, that would make the defendants liable.

The defendants' contention is that the jury had no right, upon the plaintiff's evidence, to find that Sullivan's assault was committed in the pursuit of any duty resting upon him as the servant of the defendants; and they rely upon *Howe* v. *Newmarch*,

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12 Allen, 49. And doubtless the plaintiff's evidence did tend strongly to indicate that Sullivan made the assault, not for the purpose of protecting the defendants' property, but merely to punish the plaintiff for having previously defiled the closet; in which case it would be difficult to hold the defendants liable for his act. *Brown* v. *Boston Ice Co.* 178 Mass. 108. But we need not spend time upon this question, for we are of opinion that upon the defendants' evidence the jury were justified in finding that Sullivan was acting within the scope of his employment and for the purpose of protecting their property in his charge. He testified that the plaintiff attempted to take the key from him by force, and that he resisted this attempt; and the jury well might have found that the force which he used exceeded what was necessary for this purpose. The question was properly submitted to the jury, and the instructions were sufficiently favorable to the defendants.

Exceptions overruled.

EMERY MALLOCK *vs.* PHILANDER DERBY & others.

Suffolk. December 15, 1905. — January 4, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Negligence, Invitation to enter premises.

In an action by a teamster against the proprietor of a chair factory for injuries from falling through an open scuttle in a passageway on the second floor of the defendant's factory, it appeared that the plaintiff's employer had a contract to cart and deliver the defendant's goods, that the plaintiff was accustomed to go to the defendant's office on the ground floor of the factory and there inquire for the shipper, John, to find out whether there were any goods to be taken, that if the shipper was not there the foreman or the manager often would tell him that he would have to see John, and sometimes would say he was upstairs, whereupon the plaintiff would go upstairs to see the shipper unless he came down before the plaintiff went up, that on the day of the accident the plaintiff at such a suggestion of the manager went upstairs in search of John, fell through the open scuttle in the passageway, and was injured. The defendant contended that the plaintiff in going into the second story of the defendant's building was a trespasser or a mere licensee, and so was not entitled to recover. *Held*, that whether there was an invitation to the plaintiff from the defendant's manager to go to the second story and the plaintiff accordingly was justified in going there, was a question of fact for the jury.

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SHELDON, J. The only question raised by this report is whether the jury had a right to find that the plaintiff went to the second story of the defendants' building by the invitation of the defendants express or implied. The defendants' building was a chair factory, four or more stories in height, with an office on the first floor, the upper floors being used for the storage of chairs and for manufacturing. There was evidence that one Kennedy, an expressman, had a contract with the defendants to cart and deliver their goods, and was accustomed to send the plaintiff, who was one of his drivers, to this factory to call for goods. The plaintiff testified that he had been accustomed, when so sent, to go to the defendants' office and inquire for their shipper John Black to see if there were any goods to be taken; that if Black was not there, he would ask the foreman if there was anything going, and the foreman would either tell him or say that he would have to see John, the shipper, and sometimes would say, "He is upstairs"; whereupon the plaintiff would go upstairs and see him, if the shipper did not come down before there was time to go up; that sometimes one Reed, the defendants' superintendent or manager, told him to see John; that when he asked Reed where John was, Reed would say he was upstairs, or send the plaintiff to some other part of the building; that he meant that Reed would tell him the direction where John would be, and he would go and find him; that the goods he was to take were delivered to him from the first floor, and he received them outside and took them on his wagon. He further testified that on this occasion he was sent by Kennedy to the defendants' factory for goods; that he went to the office and asked if anything was going out, and Reed said, "I cannot tell you; you will have to see John"; that the plaintiff asked, "Where is John?" and Reed answered, "He is upstairs"; that the plaintiff said "All right," and went upstairs, and there shouted for John, and while going in the direction from which he thought he heard an answering voice, he fell through an open scuttle in the passageway, and received the injuries complained of.

The defendants asked the judge to rule that this language and testimony, if believed, would not constitute a sufficient invitation and authority to the plaintiff to go to the second story, and that

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he could not recover. The judge refused this request, and submitted to the jury the question whether upon all the evidence, there was an invitation to the plaintiff to go to the second story, and whether he was justified in going there, and gave instructions as to all the issues in the case not objected to; and also ruled without objection from either party that the jury had the right to consider the meaning of the language used between Mallock and Reed in the light of what had been done before by Mallock during the time Kennedy had the business, with the knowledge of the defendants or some one in authority for them. The jury found for the plaintiff; and the judge has reported the case to this court, with the stipulation that if the ruling asked for by the defendants should have been given, the verdict is to be set aside and judgment entered for the defendants; otherwise judgment is to be entered upon the verdict.

It is true that unless the plaintiff went into the second story of the defendants' building by their invitation, if he was either a trespasser or merely a licensee, he cannot recover. *Reardon* v. *Thompson*, 149 Mass. 267, and cases there cited. But it seems plain to us that upon this evidence the jury might find that he went upstairs at the suggestion and invitation of the defendants' manager; that he had a right, under the circumstances and in view of what had been done and said between them on previous occasions, to regard what Reed said to him as a request to him to go upstairs and see the shipper; that when Reed said, "You will have to see John," and "He is upstairs," he was entitled to treat this as an invitation and direction to him to go where the shipper was said to be, and where he had found him on previous occasions. *Chenery* v. *Fitchburg Railroad*, 160 Mass. 211. *Gordon* v. *Cummings*, 152 Mass. 513. *Clark* v. *Boston & Maine Railroad*, 164 Mass. 434, 439. *Johanson* v. *Boston & Maine Railroad*, 153 Mass. 57, 60.

According to the terms of the report, there must be

Judgment on the verdict.

C. F. Eldredge, (*S. A. Fuller* with him,) for the plaintiff.

W. B. Sprout, (*C. S. Knowles* with him,) for the defendants.

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C. N. QUIMBY *vs.* JOHN M. VARNUM.

Suffolk. March 10, 1905. — January 5, 1906.

Present: KNOWLTON, C. J., LATHROP, HAMMOND, & BRALEY, JJ.

Suffolk. November 16, 1905. — January 5, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Bills and Notes. Negotiable Instruments Act.

Since the enactment of St. 1898, c. 533, as well as before, one who has placed his signature on the back of a promissory note payable to the order of a third person, in blank before delivery, if he pays the note extinguishes it and cannot negotiate it. Section 121 of that statute, now R. L. c. 73, § 138, has no application to such a case, giving a remedy only to subsequent indorsers.

CONTRACT on two promissory notes made by John M. Varnum, the defendant, payable to the order of John H. Hurley, attorney, one for $250 dated October 10, 1898, payable twelve months after date, and the other for $200 dated April 10, 1899, and payable on May 1, 1899. Writ dated June 27, 1904.

The answer, among other defences, alleged payment. At the trial in the Superior Court before *Hardy*, J., without a jury, the following facts appeared:

Both of the notes sued on were signed on the back in blank by Benjamin Varnum Howe after they had been signed by the defendant and then were delivered by the defendant to Hurley, the payee.

At the maturity of each note Hurley notified Howe that the notes were not paid and that he should look to him for payment. Howe thereupon paid the amount due on the notes to Hurley, whereupon Hurley struck his own indorsement off the notes by drawing a line through his name, and handed the notes to Howe.

Howe retained the notes in his possession until April or May, 1904, when he negotiated them to the plaintiff, to whom he owed money at that time. The notes were to be applied on Howe's account with the plaintiff. No money ever was received on the notes by Howe from the defendant.

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The defendant requested the judge to rule that the plaintiff could not recover, because Howe having indorsed the notes before delivery was an original promisor and co-maker with the defendant and not an indorser, and that the plaintiff, having received the notes after maturity and after they had been paid by Howe, the co-maker, could not maintain an action thereon; that the co-maker Howe having paid the notes to Hurley the payee at their maturity, the notes became extinguished and would not support the present action based solely on the notes; that each note was a promise to pay John H. Hurley, attorney, and that neither of the notes offered in evidence bore the indorsement of John H. Hurley, attorney, and therefore the action on the notes could not be maintained; and that on all the evidence the plaintiff was not entitled to recover.

The judge refused to rule as requested, but ruled that each note was a promise to pay to the order of John H. Hurley, attorney, and that neither of the notes offered in evidence bore the indorsement of John H. Hurley, attorney, and further ruled, at the request of the plaintiff, that Howe by placing his signature on the notes in suit in blank before delivery became secondarily liable to the payee, that payment of the notes sued on by the indorser, Benjamin Varnum Howe, did not discharge or extinguish the notes, that upon paying the face of the notes to the payee, Howe was entitled to the possession of the notes and vested with the right to recover the amount from the maker, and that after paying the amount of the notes sued on and receiving possession of them he was entitled to negotiate them, that the plaintiff upon receiving the notes from Howe succeeded to all the rights against the maker which Howe had, that where an instrument is negotiated back to a prior party that party may reissue and further negotiate the same, and that the holder of a negotiable instrument may sue thereon in his own name.

The judge found for the plaintiff in the sum of $590.53; and the defendant alleged exceptions.

This case was argued for the defendant on March 10, 1905, before *Knowlton*, C. J., *Lathrop*, *Barker*, *Hammond* & *Braley*, JJ. The counsel for the plaintiff was not called upon. Afterwards the court notified the counsel that they wished to hear further argument, and the case was reargued on November 16,

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1905, before *Knowlton*, C. J., *Morton*, *Hammond*, *Loring* & *Sheldon*, JJ.

W. A. Hayes, 2d, for the defendant.

M. S. Holbrook, for the plaintiff.

HAMMOND, J. The note of October 10, 1898, was given before St. 1898, c. 533, (now embodied in R. L. c. 73,) took effect; and of course the rights of the parties so far as respects that note are to be determined by the law of this Commonwealth as it was before the statute. By that law Howe, although entitled to notice of the dishonor of the note the same as an indorser, was nevertheless a co-maker and joint promisor, and the payment of the note by him extinguished it; and he could not thereafter put it in circulation as against his co-promisor, although in a proper action he could recover of him the amount paid, if, as between the two, it was the duty of the latter to pay the note. *Pray* v. *Maine*, 7 Cush. 253, and cases cited. *Brooks* v. *Stackpole*, 168 Mass. 537. *National Bank of Republic* v. *Delano*, 185 Mass. 424.

The same doctrine is applicable to the note of April 10, 1899, which was made after the statute above named took effect, unless there is something in that statute to the contrary. The plaintiff contends that there is something there to the contrary. He contends that under R. L. c. 73, §§ 80, 81, the rights and liabilities of Howe were those of an indorser and therefore he was only secondarily liable, and that by § 138 the payment of the note by Howe did not extinguish it but he was remitted to his former rights on the note, and under that section and § 67 might reissue it.

But we cannot adopt this interpretation of the statute. It is manifest that the precise case in hand, so far as respects the original signature of Howe, is described in § 81 of the statute in the following words: "Where a person, not otherwise a party to an instrument, places thereon his signature in blank before delivery, he is liable as indorser . . . : 1. If the instrument is payable to the order of a third person he is liable to the payee and to all subsequent parties." This section accurately defines the liability of Howe upon this note. And in a sense this liability may be said to be secondary.

Section 138 of R. L. c. 73, provides that "where the instru-

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ment is paid by a party secondarily liable thereon it is not discharged; but the party so paying it is remitted to his former rights as regards all prior parties, and he may strike out his own and all subsequent indorsements, and again negotiate the instrument," with some exceptions not here material. It is plain that this section cannot apply to a case like the one before us. First, what kind of note would this have been if Howe had done what the statute suggests? Let him strike out his own and all subsequent indorsements. Subsequent indorsements must be held to mean subsequent in point of liability. He must therefore strike out not only his own indorsement but also that of the payee. Having done what the statute says, he has a note signed by Varnum payable to the order of Hurley, but without Hurley's indorsement, and further, without any right to Hurley's indorsement. Is such a note negotiable? * Again, the statute says that the party secondarily liable is remitted to his former rights as regards all former parties. But the only prior party Howe could look to is the maker, for he stands next to the maker in the order of liability, but, as against him, Howe never had any claim on the note as such, and it never was intended that he should have. If this note never had been delivered to Hurley, but had been handed to Howe in the first instance by Varnum, could Howe have negotiated it without the indorsement of the payee? And when he has paid it and is remitted to his former rights, does he get any other right than he had before? The section is clearly inapplicable to such a state of things. It is intended to apply where the person secondarily liable can trace his title on the face of the note and its indorsements through the prior parties to the party whom he seeks to hold. This Howe could not do, nor can the plaintiff. Having paid the note Howe had an action against Varnum to recover, but the action was not upon the note.

It follows that the plaintiff cannot recover on either note.

Exceptions sustained.

* In the case at bar the note sued on did not bear the indorsement of the payee, Hurley having struck out his own indorsement before he handed the note to Howe. See p. 211.

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JOHN CASHMAN *vs.* CITY OF BOSTON.

Norfolk. March 27, 1905. — January 5, 1906.

Present: KNOWLTON, C. J., MORTON, LATHROP, HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Municipal Corporations.

A city engineer has no authority to waive provisions in a contract with the city for the furnishing of work and materials, that any claim of the contractor for loss or extra cost shall be presented within a certain time in an itemized bill with vouchers and a copy of the order under which the cost was incurred, and that where these requirements have not been complied with no sum shall be allowed for extra work or extra materials without the approval in writing of the mayor.

CONTRACT to recover compensation for extra work and materials furnished to the city of Boston in connection with work done under a contract in writing dated October 19, 1901, to build retaining walls on Carleton Street in Boston and complete them before July 1, 1902. Writ dated April 15, 1903.

At the trial in the Superior Court before *Bell*, J. the material facts were admitted, and no evidence except the contract was introduced.

The fourth article of the contract and the material portion of the sixth article are quoted in the second paragraph of the opinion.

Article third of the contract was as follows: "Article 3. The contractor shall conform to all determinations and directions of the engineer relating to the commencement of the work, the order or manner of doing the work, the proper interpretation of the specifications, plans and drawings, the fitness of any of the employees or the number thereof, the suitableness, amount, quality and value of anything done or used on the work, any injury, loss or extra cost sustained by the contractor and the amount thereof, or any expense, loss or damage incurred by the city and the amount thereof, in the doing of the work, or the date of the completion of the work, and the superintendent shall be deemed the referee of both parties to make such determinations and directions; and the contractor shall permit the superintendent and engineer and persons designated by either of them

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to enter upon and inspect the work at all times and places, and shall provide proper facilities for such entry and inspection."

Section four of the specifications began as follows: "Piles. New, sound and straight spruce piles not less than six inches in diameter at the point, and of such length that when cut off they will be not less than 30 feet long, are to be furnished and driven for foundations."

The following facts were agreed upon by the parties:

Sometime during the last of December, 1901, the city engineer directed the plaintiff to drive piles of a length greater than thirty feet, but the plaintiff refused to drive piles of this length, and soon after, about January 1, 1902, called upon the city engineer and directed his attention to the length of piles which were required to be driven and the requirements of the contract to furnish the piles in accordance with the provisions of section four of the specifications. The engineer at that time had directed the plaintiff to drive piles exceeding thirty feet in length, many of them as long as forty-five feet.

The plaintiff at that interview with the engineer refused to drive piles under the contract over thirty feet in length, and stated to him that if he was required to drive them any additional length it was to be with the understanding that he should receive reasonable compensation for the length over the thirty feet. Thereupon the engineer told the plaintiff to go on with that understanding, saying to him in substance that the plaintiff would thereby waive no rights and that the whole matter of construction of the contract would, after the completion of the work, be presented to and passed upon by the law department of the city.

Pursuant to this interview the plaintiff on February 20, 1902, wrote to the engineer as follows: "As you suggested some time ago when I was at your office, I will go ahead with the Carleton Street work, and furnish and drive any length pile you require, but I shall claim extra pay for all piles driven to a greater depth than thirty feet below cut-off or grade 5 as shown on plan, as my contract calls for; also compensation for the extra expense I have been to changing pile driver, taking away thirty foot piles and pumping on account of longer piles being required than I agreed to furnish according to my contract."

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This letter was received by the city engineer, and no reply to it ever was sent.

At the date of this letter there were about three hundred and forty piles driven, all of which were more than thirty feet in length and most of them over forty feet in length. During the progress of the work a daily account was kept of the number and length of piles driven, and this showed lengths for the whole work averaging substantially forty-one feet.

On October 11, 1902, an assistant engineer in the employ of the defendant sent to the plaintiff a letter asking him to send any bills for extra work on the Carleton Street wall.

Pursuant to this letter on November 25, 1902, the plaintiff made and sent to the defendant the bill in suit, and there was no dispute as to the amount which the plaintiff was entitled to recover, if anything.

The city engineer by his inspectors and assistants directed the driving of the piles, and whatever the plaintiff did was done under the direction of the city engineer or his assistants.

The plaintiff never sent or delivered before the fifteenth day of the month following the month in which the alleged extra work was performed to the superintendent of streets and the engineer an itemized bill of his claim for extra work or for any injury or loss with a full statement in writing of the causes thereof, or any itemized bill or vouchers for the extra cost with the order, or a copy of the order by authority of which the cost was incurred, and never sent any other demand or bill save the one already referred to dated November 25, 1902, and annexed to the declaration. No request or demand for any other account ever was made of the plaintiff by the defendant or its representatives.

It was not contended that the plaintiff had failed to comply with any terms or provisions of the contract except those relating to extra work.

The defendant contended that the plaintiff had failed to comply with the requirements of articles fourth and sixth of the contract and consequently could not maintain this action.

The plaintiff contended that if article sixth and the other provisions of the contract referred to were applicable to the work in suit, any requirement for compliance with those provisions as

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to the claim in suit was complied with by the plaintiff or waived by the acts and conduct of the defendant's representatives.

If upon the facts so far as competent the jury would be authorized to find compliance with or waiver of article sixth or other provisions of the contract, proposals and specifications therein referred to, relating to a claim for extras, a verdict was to be directed for the plaintiff in the sum of $4,218.85; otherwise, a verdict was to be directed for the defendant.

The judge directed a verdict for the plaintiff in the sum of $4,218.85, and, at the request of the defendant, reported the case for determination by this court. If upon the facts so far as competent the jury would be authorized to find a compliance with or a waiver of article sixth or other provisions of the contract, proposal and specifications therein referred to, relating to claims for extras, the verdict was to stand; otherwise, such disposition of the case was to be made as the decision of this court upon questions of law might require.

The case was submitted on briefs at the sitting of the court in March, 1905, and afterwards was submitted on briefs to all the justices.

A. L. Spring, for the defendant.

J. E. Cotter & J. P. Fagan, for the plaintiff.

HAMMOND, J. The only question is whether the facts set out in the report would warrant a finding by the jury of a compliance by the plaintiff with, or a waiver by the defendant of, the sixth article or other provisions of the contract relating to "claims for extras."

The provisions in the contract relating to this matter are contained in the fourth and sixth articles of the contract. The fourth is as follows: "The contractor, if he sustain any injury or loss or extra cost, for which the city is responsible, shall, before the fifteenth day of the month following a month in which the same is sustained, deliver to the superintendent and the engineer an itemized bill of such injury or loss, with a full statement in writing of the cause thereof, and an itemized bill and vouchers for the extra cost, with the order, or a copy of the order, by authority of which the cost was incurred." The sixth article provides that no sum shall be allowed for extra labor or extra materials "in cases where the provisions of

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article four have not been complied with, unless the mayor shall, in writing, approve thereof." There is ample evidence to warrant the conclusion that the engineer had waived this provision so far as he had the power to do so. But the difficulty is that he had not the power. By the third article of the contract he had full authority to interpret the specifications, but he had no power to waive the terms of the contract as to "claims for extras."

The mayor was the only officer authorized to waive the non-compliance with the provisions of the fourth article, and he could do that only by an approval in writing. There are obvious reasons why claims for extra labor or material should be promptly and clearly presented by the contractor, and that the waiver of such a provision should not be left to any other than the chief executive officer of the city. Such provisions are intended to protect the public treasury, are easily complied with by the contractor, are reasonable in their nature and are to be enforced. The case is clearly to be distinguished from *Sheridan* v. *Salem*, 148 Mass. 196, upon which the plaintiff relies. In the present case the majority of the court are of opinion that there is no evidence of a waiver by the defendant acting through its city council or other general officers, nor by any officer having the power to waive.

Judgment for the defendant.

LEWIS C. CLARK, trustee, *vs.* GEORGE A. WILLIAMS, & another.

Worcester. October 2, 1905. — January 5, 1906.

Present: KNOWLTON, C. J., LATHROP, HAMMOND, LORING, & BRALEY, JJ.

Equity Pleading and Practice. Sale. Bankruptcy.

Upon an appeal by a plaintiff from a decree in equity granting part of the relief prayed for but not the whole, the defendant if he has taken no appeal cannot raise the point that there is no jurisdiction in equity.

If the lessor of machinery which is in the possession of the lessee gives a bill of sale of it, absolute on its face, under an oral agreement that it shall be held as security for certain notes, without recording it or giving notice to the lessee who has no knowledge of the transaction, this passes no title good against at-

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taching creditors of the vendor, and if he is adjudicated a bankrupt his trustee in bankruptcy, who has had no previous knowledge of the bill of sale, can maintain a suit in equity to establish his title to the property subject to the lease and his right to the rent accruing after the adjudication in bankruptcy.

BILL IN EQUITY, filed December 17, 1904, by the trustee in bankruptcy of the estate of George N. Keyes of Worcester, adjudicated a bankrupt on March 29, 1904, to set aside a bill of sale, dated September 1, 1903, of certain machinery and appliances in the manufacturing building known as the J. N. Keyes machine shop in that city.

The case was heard by *Wait*, J., who made certain findings of fact the substance of which is stated in the opinion. He made the following decree:

"That the petitioner is entitled to hold and retain as part of the estate of the bankrupt Keyes, so much of the property described in the bill of sale annexed to the bill of complaint as was not either in the possession of the respondents at the time of said Keyes' bankruptcy or was not included in a lease from said Keyes to the Builders Co-operative Finish Company, and that to so much of said property the respondents and each of them are enjoined and restrained from making any disposition or asserting any rights."

And further "that the respondents are entitled to hold and retain under their bill of sale, so much of the property therein described as was in their possession at said Keyes' bankruptcy, and are also entitled to so much as was included in a lease from said Keyes to the Builders Co-operative Finish Company, and to the rent paid since said Keyes' bankruptcy by the Builders Co-operative Finish Company, for the use of said property leased to them, and that the petitioner account to them therefor, so far as said rent has been received by him or on his account."

The plaintiff appealed.

H. L. Parker, for the plaintiff.

T. H. Gage, Jr., (*F. F. Dresser* with him,) for the defendants.

HAMMOND, J. The defendants' objection that the plaintiff has a plain, adequate and complete remedy at law and that therefore equity has not jurisdiction, although made in the amended answer, does not appear from the record before us

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to have been much relied upon at the hearing in the Superior Court. But however that may be, jurisdiction in favor of the plaintiff was assumed by that court, and, since the defendants did not appeal from the decree, they cannot, upon this the plaintiff's appeal, raise this question of jurisdiction. *Cohen* v. *Nagle*, *ante*, 4. See also *Haskell* v. *Merrill*, 179 Mass. 120, and cases cited.

At the time of the delivery of the bill of sale by Keyes to the defendants, a part of the property therein described was in the possession of the defendants, a part in the possession of Keyes, and the rest in the possession of the Co-operative Builders Finish Company under a lease theretofore made by Keyes and still in force. There has since been no change in the possession of any part of the property. The trial judge "decided" that the title to the property described in the lease to the Builders Finish Company, as also that which was in the possession of the defendants at the time the bill of sale was delivered to them, passed to the defendants, and that the plaintiff had title to that of which Keyes retained possession; and a decree was made declaring in substance that the defendants are entitled to hold and retain under their bill of sale so much of the property therein described as was not retained in the possession of Keyes.

The bill of sale though absolute in form was given under an oral agreement that it should be held simply as security for the notes held by the defendants against Keyes. At the most it was only a mortgage. *Williams* v. *Nichols*, 121 Mass. 435. R. L. c. 198, § 1, provides for the recording of mortgages of personal property, and that unless the mortgaged property has been delivered to and retained by the mortgagee the mortgage shall not be valid against a person other than the parties thereto until it has been recorded as required by the statute. This mortgage was not recorded, and, the mortgage agreement being oral in part, it could not be. *Williams* v. *Nichols*, *ubi supra*. There was no attempt to make any actual or constructive delivery. As to the property then in the hands of the defendants a delivery was unnecessary. It may be fairly assumed that after the receipt of the bill of sale the defendants held that portion of the property under the agreement. The decree being

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in favor of the plaintiff and the defendants not having appealed, no question arises as to the right of the plaintiff to hold the property retained by Keyes.

The real question relates to the property leased to the Builders Finish Company. Was there any delivery to the defendants of that property? The delivery required by the statute is the same as that required in an absolute sale to pass to the vendee the title as against attaching creditors of the vendor. *Wright* v. *Tetlow*, 99 Mass. 397. It is clear that there was no actual delivery. Was there any constructive delivery? It is a familiar principle of law that when property is in the hands of a third party such as a bailee or a lessee, a delivery can be made by a notice to such party of the sale or mortgage. But in the present case no attempt was made to give such a notice and neither the lessee nor the plaintiff had any notice or knowledge of the bill of sale until after the appointment of the latter as trustee in bankruptcy of the estate of Keyes. Moreover Keyes received the rent from the lessee until he was adjudicated a bankrupt. In no way whatever can it be said that there ever has been any actual or constructive delivery to the defendants of this leased property, or that they ever retained possession of any part of it. The only thing done was to deliver a bill of sale, and under the circumstances disclosed that was not enough to constitute a constructive or even a symbolical delivery. *Carter* v. *Willard*, 19 Pick. 1. *Burge* v. *Cone*, 6 Allen, 412. *Dempsey* v. *Gardner*, 127 Mass. 381. Under the doctrine clearly set forth in *Carter* v. *Willard*, and ever since followed in this Commonwealth, it is clear that while as between the parties to the bill of sale the title passed, still there was no such delivery as passed the title as against the attaching creditors of Keyes. In so far as the decision in *Corning* v. *Records*, 69 N. H. 390, upon which the defendants rely, is inconsistent with this doctrine, we cannot follow it.

While, by reason of the possession of the lessee, this property could not be directly reached by attachment and execution at the common law by the creditors of Keyes, yet they could reach it under trustee process subject to the rights of the lessee, as if the property had been attached upon an original writ of attachment. R. L. c. 189, §§ 19, 24. And it would have been the

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duty of the lessee, at least after the expiration of the lease, to expose the goods so that the interest thus reached could be taken and sold on execution. R. L. c. 189, §§ 57, 58. *Clark* v. *Brown*, 14 Mass. 271. It was "property which prior to the filing of the petition [in bankruptcy] . . . might have been levied upon and sold under judicial process against" him and passed to the trustee. U. S. St. 1898, c. 541, § 70 a (5). Nor is the trustee to be regarded as a party to the mortgage so as to come within the exception to the statute which provides that the mortgage shall not be valid against a person "other than the parties thereto." *Bingham* v. *Jordan*, 1 Allen, 373. *Haskell* v. *Merrill*, 179 Mass. 120.

It follows that as between the plaintiff and the defendants the title to the property held under the lease is not in the defendants but in the plaintiff subject to the rights of the lessee. The decree in this respect is reversed, and as to this property and the rent under the lease the decree is to be for the plaintiff. In every other respect the decree is to stand.

So ordered.

HORACE D. HARDY, administrator, *vs.* MARY ROACH & others.

Essex. November 9, 1905. — January 5, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & BRALEY, JJ.

Devise and Legacy.

The residuary clause of a will was as follows: "The balance of my estate is to be divided in equal portions to" (naming three persons) "daughters of my deceased brother P. my brother J. the children of my deceased sister M." (naming four persons). The will was in the handwriting of the testator. The name and residence of his brother J. were written in a separate paragraph in the centre of the residuary clause. Above it was the paragraph which named three daughters of his deceased brother P., and below it was the paragraph which named four children of his deceased sister M. The testator at the time of his death had three sisters living not mentioned in this clause, and there were living six children of his deceased brother P. and six children of his deceased sister M. *Held*, that the property should be distributed among the eight persons named *per capita* and not *per stirpes*.

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BILL IN EQUITY, filed March 28, 1905, by the administrator with the will annexed of Michael J. Roach, late of Amesbury, for instructions as to the true interpretation of the twelfth clause of the will by which the defendants were made residuary legatees.

The case came on to be heard before *Morton*, J., who with the consent of the parties reserved it upon the pleadings and an agreed statement of facts for determination by the full court.

It appeared by the agreed facts that Michael J. Roach, the testator, was born in Ireland in 1846 and died in Essex County in this Commonwealth on November 17, 1903, leaving a will made in Wisconsin, dated June 15, 1901, which was allowed by the Probate Court for the county of Essex on February 9, 1905, containing the residuary clause quoted in the opinion of the court; that the plaintiff had in his hands and possession, as administrator with the will annexed, about $10,000 deposited in banks; that the testator left no real estate; that the defendant, James Roach, was the only brother of the testator alive at the time of the making of the will and at the time of the death of the testator; that the testator left three sisters, Julia Wilcox, Sarah Varley and Mary Size, the latter two living in Ireland; that the testator had had a brother, Patrick Roach, and a sister, Margaret O'Brien, both of whom were dead at the time of the making of the will; that six children of Patrick Roach, and six children of Margaret O'Brien, were living at the time of the testator's death; that the will was drawn by the testator and was in his handwriting.

H. D. Hardy, administrator, stated the case.

F. Burke, for the defendant James Roach.

A. W. Reddy, Jr., for the designated children of Patrick Roach.

N. L. Foster, for the designated children of Margaret O'Brien.

HAMMOND, J. The clause in question, printed so as to show the division into paragraphs and the method or lack of punctuation as actually appearing in the will, is as follows:

"Twelth The balance of My Estate is to be—
devided in Equal portions to Mary Roach
Margaret Roach Catherine Roach. 32 Orchard
Street Amesbury Mass daughters of my

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deceased brother Patrick Roach
My Brother James Roach of Lyme
Connecticut
The children of My deceased Sister
Margeret O Brie
Delia O Brien, Catherine O Brien of
Lyme Connecticut Joseph O Brien of
337 Washington Street New Haven
Connecticut Charles M O Brien —
West Chester New York City"

The question is whether these legatees take *per stirpes* or *per capita*. If *per stirpes*, then the three Roach children take one third, James Roach one third, and the O'Brien children one third; if *per capita*, then each of the legatees takes one eighth. At the time of the testator's death there were other children of the testator's brother Patrick Roach and of his deceased sister than those named. The clause in question distinctly describes the legatees by their respective names, and plainly says that the property shall be equally divided between them; and we see nothing in the method of division into paragraphs, or in the other framework of the clause, to indicate that this language is to be taken in any other than its ordinary meaning. It is plain that the legatees take *per capita*.

Decree accordingly.

SHERMAN NELSON & others, trustees, *vs.* INHABITANTS OF GEORGETOWN & others.

Essex. November 9, 1905. — January 5, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & BRALEY, JJ.

Municipal Corporations. Charity. Trust.

A gift was made to a town of a building for a library and of a fund which was to accumulate for twenty years, with a provision that after that time the town by a vote of two thirds of its legal voters might act as they thought best for the good of the people of the town in regard to selling the library building and

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adding the proceeds to the capital of the fund and the erection of a new building. A board of trustees was provided for to whom the donor left "the details of the management and regulation" of the trust. After the expiration of the twenty years, the town, by a vote of two thirds of its legal voters, accepted the gift of a certain lot of land as a site for a new library building and voted that the trustees be instructed to erect a library building on the lot at a cost not to exceed $15,000. The trustees in good faith made a contract for the erection of a library building to cost less than $15,000 and later made a supplemental contract including extras, by which the whole cost of the building was to be $16,505. The town at its next annual meeting by a two thirds vote accepted and approved the report of the trustees which stated these contracts and payments amounting to $10,000 on account of them. *Held*, that the town by the terms of the gift had authority not only to select the site for the new building but also to fix the cost of it, and that although under the first vote of the town limiting the cost to $15,000 the second contract of the trustees to pay more than $15,000 for the building did not, when made, bind the town, yet the subsequent vote ratified this contract and made it as binding on the town as if originally authorized.

A gift to a town for a library provided that the details of the management and regulation of the fund should be left to the trustees, and gave the town authority by a two thirds vote of its legal voters to select the site for the library building and to fix its cost. The trustees, having the fund in their hands, made a contract for the erection of a library building at a cost which was in excess of their original authority and reported this contract and certain payments on account of it to the town, which by a two thirds vote at an annual town meeting ratified their acts. Upon a bill by the trustees for instructions as to paying to the contractor the balance called for by the contract the court, in holding that the acts of the trustees had become binding on the town by ratification, also held that, although the details of management and regulation, except as to the site and cost of the library building, belonged to the trustees, yet the fund was the property of the town and should be in its custody, and directed the trustees to deliver it to the town treasurer or to such other officer as the town might direct; but, inasmuch as the trustees had made the contract in good faith, ordered that the fund when paid over should be charged with a trust in their favor to the extent necessary to indemnify them against any loss by reason of personal liability to the contractor.

BILL IN EQUITY, filed in the Superior Court on March 30, 1905, by the trustees for the year 1904 of the Peabody Library in Georgetown, established in 1869 by George Peabody, late of London, England, against the town of Georgetown, the trustees of the said library elected for the year 1905, and Edwin H. George, having a contract with the plaintiffs for the erection of a library building, for instructions.

The case came on to be heard on the bill and answers before *Gaskill*, J., who at the request of the parties reserved it and all questions of law therein for determination by this court.

The letter of gift, the material portions of which are quoted in the opinion, was dated at London, January 23, 1869. It con-

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tained the following paragraph in regard to the powers and constitution of the board of trustees:

"I leave the details of the management and regulation to the Board of Trustees, who shall be constituted thus: — The settled or stated minister of each religious society in the town, including the minister in Byfield Parish, shall be *ex officio* a member. The remainder of the board shall consist of six members who shall be residents of different sections of the town, as follows — two shall be resident in what are school districts, numbers one, two and three; three shall be residents in districts four and five; and one shall be a resident in districts six and seven; — and said Trustees shall be chosen annually by the Town."

The vote of the town of Georgetown of March 12, 1904, mentioned but not quoted in the opinion, was passed at its annual town meeting for that year by a vote of two thirds of its legal voters, and was as follows:

"That the Town accept the lot known as Lincoln Park as a gift from the donors as a site for the Library building, and that the Trustees of the Peabody Library be instructed to erect a Library building on that lot at a cost not to exceed $15,000, ready for occupancy."

On August 18, 1904, the defendant George made a contract with the plaintiffs to erect the library building for the sum of $14,998, which by a supplementary agreement of September 15, 1904, in regard to extra work, was changed to $16,505. The defendant George proceeded with the work with due diligence, and had nearly completed it at the time of the annual meeting of the town of Georgetown in March, 1905, at which the action was taken which is described in the opinion. Various payments on account were made to him by the plaintiffs, but there was still a balance of several thousand dollars due to him at the time of the filing of the bill.

H. F. Hurlburt, Jr., (*B. B. Jones* with him,) for the plaintiffs.

W. S. Knox, for certain defendants.

H. J. Cole, for the defendant George.

HAMMOND, J. 1. The letter of the donor is addressed to "the inhabitants of the town of Georgetown," that is, to the town by its proper corporate name. In it the donor states that in accordance with a promise theretofore made by him he had

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"caused a building to be erected for the purpose of a public library for the benefit of yourselves and your successors"; that he takes "great pleasure in presenting it to you, together with about twenty-four hundred volumes of standard works which . . . are now in the hands of the Library Committee"; and that he had also placed in the hands of the finance committee of the library the balance of the $12,000 which he had originally promised.

He then states that $3,000 of this balance "shall be always kept invested and the income thereof applied to the increase and care of the library"; that "the remainder shall be kept invested and accumulate until it shall amount, either by itself or in connection with other donations (if such there shall be) to the sum of not less than twenty thousand dollars, when it may be used for the erection of such a building as may then be necessary to furnish suitable accommodations for the library"; and that "the building which has been erected, is to be absolutely the property of the town, for the purpose of a library building, and so long as it shall be used for such purpose, it may stand on the site it now occupies on the Memorial Church lot." Then, after a paragraph not here material, comes the following:

"If the building now erected should at any time within the space of twenty years from the 1st inst. (January 1, 1869,) be considered not sufficient to accommodate the library and inhabitants who resort to it, and the sum of $20,000, (named) has accumulated and on hand, the voters of the town, assembled by legal notice, may by a vote of three-fourths of such legal voters fully empower the inhabitants ot the town to have the present building sold for removal and a new one of brick, as stated, erected on the same site, and no other site shall be used for a library building before the 1st of January, 1889; after which time the inhabitants of the town by a vote of two-thirds of the legal voters shall act as they think best for the good of the people of the town: if the present edifice is sold and removed, the proceeds may be added to the capital on hand and be considered a part of the $20,000 required as herein stated."

It is manifest that the gift both of the building and of the remaining fund is to the town in its corporate capacity, with certain limitations and restrictions as to the manner in which the fund shall be expended, and as to the erection of a new build-

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ing. We are of opinion that so far as respects the erection of any new building the authority in the town after January 1, 1889, by a two thirds vote of the legal voters to "act as they think best for the good of the people," extended not only to the selection of a site for the new building but also at least to the question of its cost. The town by such a vote had the power to fix the cost as well as the site, and the vote of March 12, 1904, was binding upon the trustees. In so far, therefore, as the trustees exceeded this authority, their action was not originally binding upon the town.

But that is now of no consequence, because it appears that the town, at its annual meeting on the first Monday of March, 1905, with knowledge of the contracts which had been made by the trustees "and of the amount to be paid by the terms thereof, accepted and approved the report of the . . . [trustees] . . . in which payment on account of said contracts to an amount of about $10,000 was shown." It was not contended before us, and we do not understand it to be contended by any of the parties to this suit, that the vote in favor of this action was less than a two thirds vote. Under these circumstances the vote of the town must be regarded as a ratification of the act of the trustees, and the contracts are binding upon the town the same as if originally authorized. It follows that all the contracts are now binding upon the town. *Arlington* v. *Peirce*, 122 Mass. 270, and cases cited.

2. Although the details of the management and regulation of the fund so far as respects its use for library purposes (except as to the site and cost of the library building) are in the trustees, yet the fund is the property of the town and should be in the custody of the town, to be drawn upon by the action of the trustees as needed from time to time. It therefore should be delivered up to the treasurer of the town or such other officer as the town may direct. Inasmuch however as the trustees in making the contracts seem to have acted in good faith, and fear that they may be held personally liable to the contractor, we think that the fund when paid over should be held charged with a trust in their favor, to the extent necessary to indemnify them against any loss by reason of such personal liability.

So ordered.

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ARTHUR W. FRENCH *vs.* CITY OF LAWRENCE.

Essex. November 9, 1905. — January 5, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & BRALEY, JJ.

Contract, Performance and breach. *Pleading, Civil*, Declaration.

A declaration, in an action of contract against a city, alleging that the plaintiff served as a police officer of the defendant, lawfully appointed and qualified, for a period named and until a certain day, and that from that day until the date of the writ he was at all times ready to discharge the duties of his office at the daily compensation paid by the defendant, but was prevented from doing so by the agents of the defendant, and that upon a proper demand payment for his services had been refused, is good on demurrer as setting forth a cause of action.

In a declaration in an action of contract against a city for services as a police officer, in which it is alleged that the plaintiff, after an appointment and after service of six or seven years, offered to perform his duties but was prevented from so doing by the agents of the defendant, an averment that on a certain day the plaintiff "was illegally and unjustifiably prevented and restrained from performing the duties of his office by the agents of the defendant" cannot be interpreted on demurrer as an averment that the plaintiff had been suspended or removed from his office or that his offer of services was made during such suspension or after such removal.

CONTRACT against the city of Lawrence. Writ dated January 27, 1905.

The declaration alleged that the plaintiff was appointed and confirmed a police officer of the defendant in the year 1897, and that he performed the duties of a police officer until December 27, 1904; that on said date he was illegally and unjustifiably prevented and restrained from performing the duties of his office by the agents of the defendant city; that the compensation of a police officer as fixed by the defendant was at the time the plaintiff was so prevented from performing the duties of his office and up to and including the day of the bringing of his writ $2.75 a day; that the plaintiff never had been removed legally from his office and that he held himself in readiness to perform the duties of his office at all times between and including December 27, 1904, and the date of his writ, but was prevented from so performing his duties by the agents of the defendant; that the plaintiff had demanded compensation from the defendant for the time that

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he was thus prevented from performing the duties of his office, but had been refused such compensation, amounting to the sum of $85.

The defendant demurred to the declaration, assigning as cause of demurrer that the matters set out in the declaration were insufficient in law to enable the plaintiff to maintain his action. In the Superior Court the case was heard by *Gaskill*, J., who sustained the demurrer, and gave judgment for the defendant. The plaintiff appealed.

J. J. Donovan, for the plaintiff.

J. P. Kane, for the defendant.

BRALEY, J. By demurring generally the defendant admits all the allegations which are well pleaded, or essential to enable the plaintiff to maintain his action. *Chenery* v. *Holden*, 16 Gray, 125. *Dole* v. *Weeks*, 4 Mass. 451.

The plaintiff, from anything disclosed by the declaration, was rightfully in possession and exercising the functions of his office, and no material averment is found upon which the defendant relying upon *Phillips* v. *Boston*, 150 Mass. 491, 494, can base an argument that if the plaintiff unlawfully has been suspended or removed before he commenced the present action he must be restored to his office by appropriate legal proceedings before it can be maintained.

When separated from certain descriptive averments, it appears that the plaintiff served as a police officer lawfully appointed and qualified until December 27, 1904, and from that time to January 27, 1905, the date of the writ, was at all times ready to discharge the duties of his office at the daily compensation paid by the defendant, but was prevented by its agents, and that upon a proper demand payment has been refused.

These allegations when proved are sufficient to support the action. For a readiness to perform services where the plaintiff has been duly appointed, and, without being under disability, is acting under a continuing contract at a fixed daily rate of pay or salary, gives him a cause of action, if his services are refused. *Malcolm* v. *Boston*, 173 Mass. 312. *Norton* v. *Brookline*, 181 Mass. 360.

Because the plaintiff added certain qualifying phrases, the demurrant contends that the action cannot be maintained. These

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averments are that the agents of the city illegally and unjustifiably prevented and restrained the plaintiff from performing his official duties. But taking them as they stand, neither literally, nor by fair intendment can these words receive an interpretation which gives to them the force of positively averring that the plaintiff either had been suspended or removed from his office; or that his tender of service was made during such suspension, or after a removal. And as no allegation of the illegality of the defendant's action, or of justification by him for his tender of services was called for, proof of neither would be required in a trial of the merits to establish a case to which the defendant must answer. *Read* v. *Smith*, 1 Allen, 519, 521. *Rindge* v. *New England Mutual Aid Society*, 146 Mass. 286, 289. *Spicer* v. *Lynn & Boston Railroad*, 149 Mass. 207, 209.

The declaration then, states the ordinary case of a public subordinate official under a contract of service tendering performance which the municipality refuses to receive, and therefore prevents. *Norton* v. *Brookline*, *ubi supra*.

Or within the principle already stated, that the omission of allegations which need not be proved in order to make out a case does not render a declaration demurrable, it may be said that so much of the first sentence which is included within the phrase, "that on said date he was illegally and unjustifiably prevented and restrained from performing the duties of his office by the agents of the defendant city," and its connective "so prevented from" may be treated as surplusage. *Stevens* v. *Bigelow*, 12 Mass. 433, 438. *Lord* v. *Tyler*, 14 Pick. 156, 165, 166. *Hampshire Manufacturers Bank* v. *Billings*, 17 Pick. 87, 90. *Lyons* v. *Merrick*, 105 Mass. 71, 77.

The declaration consequently sets forth a cause of action, and if the defendant desires to raise the issue that during the period covered, the plaintiff was for cause either suspended or removed from his office, and hence is not entitled to recover, such a defence must be pleaded in the answer. See *Williams* v. *Gloucester*, 148 Mass. 256, 259.

Judgment reversed; demurrer overruled.

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C. MABEL WOOLFORD *vs.* PHENIX INSURANCE COMPANY.

Essex. November 10, 1905. — January 5, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & BRALEY, JJ.

Insurance, Fire. *Contract*, Construction.

A policy of fire insurance in the Massachusetts standard form containing the condition that "this policy shall be void . . . if the insured now has, or shall hereafter make, any other insurance on the said property, without the assent in writing or in print of the company," and containing in a rider attached to it a provision "that the assured shall maintain insurance on the property described by this policy to the extent of at least eighty per cent of the actual cash value thereof," becomes void if it is assigned with the assent of the company to one who without the assent in writing or print of the company already has other insurance on the property exceeding with the policy assigned the entire value of the property.

CONTRACT upon a policy of fire insurance in the Massachusetts standard form issued by the defendant to the estate of Ellen S. Robinson, and afterwards assigned to the plaintiff, with the assent of the defendant, insuring the Pigeon Cove House at Rockport in the sum of $6,000 for the term of one year beginning August 29, 1902. Writ dated May 20, 1903.

The answer contained a general denial and an allgation that there was other insurance on the property described in the policy without the assent in writing or in print of the defendant. In the Superior Court the case was heard by *Stevens*, J. upon an agreed statement of facts.

The policy contained among other things the following condition:

"This policy shall be void . . . if the insured now has, or shall hereafter make, any other insurance on the said property, without the assent in writing or in print of the company."

It also bore a rider which contained the following clause:

"New England Insurance Exchange Standard Guarantee to maintain eighty per cent insurance. It is a part of the consideration of this policy and the basis upon which the rate of premium is fixed that the assured shall maintain insurance on the property described by this policy to the extent of at least

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eighty per cent of the actual cash value thereof, and that failing so to do the assured shall be an assurer to the extent of such deficit, and to that extent shall bear his, her or their proportion of any loss that may happen to said property. Attached to and made a part of policy No. 636, Phenix Insurance Company. J. Judson Dean, Agent."

The plaintiff purchased the property, which consisted of the hotel building and furniture, a stable and about one acre of land, on December 23, 1902, from the heirs of Ellen S. Robinson for the sum of $15,500, and on or about December 26, 1902, she procured insurance on the hotel building in several companies, to the amount of $12,500. These policies were then and at the time of the fire valid insurance upon the property.

On January 3, 1903, while this other insurance was on the property, the policy in suit issued by the defendant was assigned to the plaintiff, and on the same day the assignment was assented to in writing by the defendant through its local agent. There was then, including the policy issued by the defendant, $18,500 of insurance upon the property.

On January 29, 1903, the property was totally destroyed by fire, and the defendant received notice of the loss on February 3, 1903. The value of the property at the time of its destruction was $17,400.

The plaintiff requested the judge to rule:

"That the rider containing the Eighty Per Cent Clause attached to this policy does by necessary implication authorize additional insurance without other consent, and that there was no violation of the policy by the additional insurance placed on the property by the plaintiff."

The judge refused to make this ruling. He found for the defendant; and the plaintiff alleged exceptions.

C. A. Sayward, for the plaintiff.

F. W. Brown, for the defendant.

HAMMOND, J. This clause called the "Standard Guarantee to maintain eighty per cent insurance" is of recent origin, but it does not entirely supersede the clause providing that the policy shall be void in case of additional insurance without the consent of the company. The two clauses are not necessarily inconsistent, and, to a certain extent at least, can stand together,

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each having its due scope. As stated by Hamersley, J. in a similar case, "If, as the plaintiffs claim, the adoption of the [guaranty] clause imposes on the insured an obligation to procure such additional insurance as may be necessary to keep the total amount of insurance equal to 80 per cent of the changing actual value of the property covered by the policy, and therefore impliedly gives permission to procure, or waives the provision against, such insurance, it must follow that such permission or waiver is limited by the necessity from which it is implied." *Cutler* v. *Royal Ins. Co.* 70 Conn. 566, 572. See also *Allen* v. *German American Ins. Co.* 123 N. Y. 6. In the present case the additional insurance carried the total insurance to a sum greater than the entire value of the property. Applying the principle above stated, the result is that this policy was avoided by such additional insurance. In so far as the cases of *Pool* v. *Milwaukee Mechanics' Ins. Co.* 91 Wis. 530, and *Catoosa Springs Co.* v. *Linch*, 18 Misc. (N. Y.) 209, cited by the plaintiff, are inconsistent with this view, we cannot follow them. The ruling requested was properly refused.

Exceptions overruled.

SETH P. SNOW & others *vs.* HENRY B. WILLIAMS.

Suffolk. November 13, 1905. — January 5, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Agency. Broker.

In an action by real estate brokers for a commission on a sale of real estate of the defendant the evidence, which was reported at great length, showed that in October, 1901, and February, 1902, the plaintiffs offered the property to the purchaser for $1,000,000 in cash, and he refused the offer, and that the defendant afterwards called in another broker who in November, 1902, concluded a sale of the property to the purchaser for $1,086,228, to be paid by assuming mortgages upon the property and to be placed upon it by the defendant amounting to $630,000, by $425,000 in securities to be taken at their face value, and by $31,228 in cash. *Held*, that on the evidence reported to the court it was not shown that the plaintiffs had anything to do with the trade which finally was made, or that they were in any way its efficient and predominating cause, and that the jury rightly were ordered to return a verdict for the defendant.

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CONTRACT by the members of a firm of real estate brokers, to recover a commission of one per cent for effecting a sale of the Hotel Brunswick at the corner of Boylston and Clarendon Streets in Boston and of two buildings in the rear of the hotel on St. James Avenue and Clarendon Street. Writ in the Supreme Judicial Court dated December 30, 1903.

The case was tried before *Braley*, J. The properties in question were owned by the defendant, and were transferred by him to Frederick Ayer in November, 1902, according to the terms of a letter or memorandum dated September 11, 1902, addressed to C. F. Ayer, Esquire, attorney for Frederick Ayer, and signed by Edward H. Eldredge and Company, a firm of real estate brokers doing business in Boston, the letter having been made in duplicate, one original being assented to by C. F. Ayer as attorney for Frederick Ayer, and the other by the defendant. This letter was put in evidence, and it appeared therefrom that the defendant was to sell the property, the papers to pass on or before November 1, subject to certain conditions, the price to be paid for the two estates to be $1,086,228.60. There was a first mortgage for $400,000 on the Hotel Brunswick property, maturing December 16, 1908, and as a part of the transaction there were put upon the property a second mortgage for $100,000, maturing on the same date, and a third mortgage for $80,000 to run for two years. On the houses in the rear there was a mortgage of $50,000, making a total mortgage indebtedness of $630,000, leaving $456,228.60 to be paid in securities, credits and cash as follows: $200,000 by transfer to the defendant of $200,000 par value of preferred stock of the Westminster Chambers trust, $225,000 by the transfer to the defendant of $225,000 first mortgage bonds of the Carleton Hotel trust, the balance to be paid in cash.

The plaintiffs contended that, they having offered the properties to Frederick Ayer for $1,000,000 in cash in October, 1901, and in February, 1902, their efforts were the efficient and predominating cause of the trade which finally was closed by the defendant through the instrumentality and supervision of Edward H. Eldredge and Company, whom the defendant called in without the plaintiffs' knowledge or consent.

The evidence was reported to this court in a record of thirty-eight printed pages.

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The defendant asked the justice to rule that upon all the evidence the plaintiff could not recover. The justice so ruled, and ordered the jury to render a verdict for the defendant. At the request of the plaintiffs, and by agreement of the parties, he reported the case for determination by the full court, with the reservation that if his ruling was wrong and there was any evidence to be submitted to the jury, judgment was to be entered for the plaintiffs in the sum of $10,862.28, with interest from the date of the writ; otherwise, judgment was to be entered on the verdict for the defendant.

W. H. Baker, for the plaintiffs.

R. F. Sturgis, for the defendant.

HAMMOND, J. The evidence in this case is somewhat voluminous, but it has been carefully read and considered. It would serve no useful purpose to recite it in detail. We are of opinion that it is not sufficient to show that the plaintiffs had anything whatever to do with the trade which was finally made, or that they were in any way its efficient and predominating cause. The jury were rightly ordered to render a verdict for the defendant.

Judgment on the verdict.

ADELARD PHANEUF & another *vs.* ELIZA J. COREY & others.

Middlesex. November 14, 15, 1905. — January 5, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Contract, Building contracts. *Referee. Arbitrament and Award.*

If the respective rights of the parties under a building contract have been referred by an agreement in writing to a referee for decision, and the referee in making his award keeps within the scope of the submission, the award is not open to question on the ground that the referee was mistaken in his interpretation of the contract.

A contract for the construction of a building provided that the whole of the work should be completed on April 1 of a certain year, and that, in case of a failure of the contractor to complete the building by that date, he should forfeit to the owner $10 per day for each day of delay in completing the building, "the forfeit to be deducted from the contract price." On May 20 the building was substantially completed, but never was wholly completed by the contractor as required by the specifications. There being a dispute as to what the specifica-

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tions required, the contractor retained possession of the building until on October 6 of the same year the owner put him out and completed the requirements of the contract through the employment of other persons at a cost of about $400, which fairly represented the value of the work. In an action by the contractor on an account annexed for work done and materials furnished, it was *held*, that, besides deducting from the contract price the sum paid by the defendant in completing the building, the defendant was entitled to deduct as liquidated damages the sum of $10 per day not only to May 20, when the building was substantially completed, but also from May 20 until October 6, when the defendant terminated the employment of the plaintiff and took possession of the building.

CONTRACT for labor and materials performed and furnished in the construction of a building on land of the defendants in Marlborough. Writ dated December 7, 1899.

The first count was on a contract in writing dated August 1, 1898, and the specifications incorporated therein, by which the plaintiffs agreed to construct a two story building on land of the defendants in Marlborough, Massachusetts, to be known as the Corey Building, according to certain plans and specifications, and to complete the building on certain dates, and by which the defendants agreed to pay the plaintiffs for the work the sum of $59,794 in certain instalments. The amount alleged in this count to be due the plaintiffs under the contract was $59,794.

The second count was on the contract and alleged that in addition to the amount of $59,794 the defendants also owed the plaintiffs the sum of $8,539.63 on account of certain alterations made in the work under Article III. of the contract and certain additional work done in consequence of these alterations.

The third count was on an account annexed, and alleged that the defendants owed the plaintiffs the sum of $74,561.25 and interest thereon from November 1, 1899, as stated therein.

The fourth count was on the written contract and alleged that the defendants owed the plaintiffs the sum of $6,426 as damages for certain delays in the work caused by the failure of the defendants to provide certain labor and materials not included in the contract in such a manner as to delay the progress of the work.

The fifth count was on an account annexed, and alleged that the defendants owed the plaintiffs the sum of $8,476.46, according to that account.

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The sixth count was on the written contract and on a further written agreement dated December 15, 1898, by which certain differences and disputes which had arisen between the parties were submitted to arbitration. This count alleged that the arbitration was had and an award thereunder made, that all matters submitted by the agreement of December 15, 1898, were finally determined, and that the defendants owed the plaintiffs the sum of $59,794 under the written contract of August 1, 1898.

The seventh count was based on the written contract of August 1, 1898, and on a further oral agreement, changing the written contract, by which the defendants promised to furnish for the use of the plaintiffs in their work under the contract a certain steam heating plant, and to place this plant in the building as soon as it was necessary for the plaintiffs to have it for the purposes of their work. This count alleged that the defendants owed the plaintiffs by virtue of the contracts the sum of $59,794.

The eighth count was based on the written agreement of August 1, 1898, and on the further written agreement of December 15, 1898, and on the further oral agreement to furnish a heating plant, and alleged that the defendants owed the plaintiffs the sum of $59,794 by virtue of these contracts and agreements.

The defendants, in their amended answer, admitted that they executed the contract dated August 1, 1898, but alleged that it was not completely executed by the parties until September 8, 1898; denied that they had broken the contract in any respect; pleaded certain payments amounting altogether to $40,700; denied that any further sums were due the plaintiffs under the contract or otherwise; alleged many breaches of, and failures to perform, the contract on the part of the plaintiffs; admitted certain items of additional work, but alleged that they had paid the plaintiffs therefor; denied that they delayed the plaintiffs in their work; alleged that on account of the failure of the plaintiffs to perform their contract the defendants were obliged to terminate the employment of the plaintiffs and complete the work at their own expense, and set up various other defences based upon specific provisions of the contract.

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Article sixth of the contract of August 1, 1898, described in the opinion, was as follows:

"Art. VI. The contractor shall complete the several portions, and the whole of the work comprehended in this agreement by and at the time or times hereinafter stated, viz: — the stores and basements shall first be completed and delivered, ready for occupancy by tenants, not later than the first day of December, 1898, and the whole of the work fully completed not later than January first, 1899, and it is especially agreed and understood that in case of the failure of the contractor to deliver said stores and basements ready for said occupancy, or to complete the building as aforesaid, at the times above written, the contractor shall forfeit to said owner the sum of thirty (30) dollars per day for each and every day of delay in the delivery of said stores and basements, and ten (10) dollars per day for each and every day of delay in the completion of the remainder of the building, said forfeit or forfeits to be deducted from the contract price.

"The contractor shall be entitled to receive from the owner thirty (30) dollars per day for each and every day that said stores and basements may be completed and ready for occupancy by tenants before said first day of December and ten (10) dollars per day for each and every day that said building shall be completed as aforesaid before said first day of January next."

The agreement of December 15, 1898, was as follows:

"Whereas various differences and disputes have arisen between the owners and contractors named in a certain contract dated August 1, 1898, entered into by Adelard Phaneuf and Henry H. Hunt, parties of the first part, and Eliza J. Corey, Blanche E. Holyoke and Lizzie E. Crowell, parties of the second part, for the erection and completion of a building at Marlborough, Mass., known as the Corey Building, and

"Whereas the owner's superintendent has certified that there is sufficient ground for terminating the employment of the contractors Phaneuf and Hunt, and the owners have notified said contractors that their employment is terminated, and

"Whereas the contractors are desirous of completing the work covered by said contract and in accordance with the terms thereof, and the owners are willing that they should do

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so, provided a satisfactory adjustment with proper allowances is now arrived at so as to remove the principal causes of dispute which have already arisen,

"Now therefore the said owners and contractors enter into the following agreements and stipulations: —

"1. They hereby ratify and confirm said contract of August 1, 1898, in all respects, except so far as the same is hereby expressly changed or modified.

"2. The time for the completion of the stores and basements is hereby extended, subject to the same terms and conditions expressed in said original contract, to the first day of March, 1899, and the time for the completion of the whole building is hereby extended to the first day of April, 1899, and the contractors admit that those extensions are now necessary for the completion of the said stores and basements and of the whole building respectively.

"3. They hereby agree to refer to William H. Sayward of the Master Builders' Association the question of what, if any, amount under and by virtue of the terms of said contract should justly and fairly be deducted from the contract price by reason of the said delay, which it is now agreed and admitted is inevitable, and such amount shall be deducted from the next instalment hereafter paid under said contract. And the said Sayward shall consider whether the contractors have suffered because of any fault or delay on the part of the owners in furnishing plans, or in making payments, and if so, shall make proper allowances therefor. But such allowance made to the owners shall not include any such damages to the owners as are referred to in Art. VIII. of the original contract, for which the contractors shall continue to be liable.

"4. The said Sayward shall also determine whether or not the rear and extension walls of said building have been built in accordance with the contract, plans and specifications, and if not, he shall determine whether the owners have a right to insist that the whole or any part of said walls shall be taken down and rebuilt as though the same was new work and according to the original contract, plans and specifications, or shall, if requested by the owners, assess the damages to the owners and building caused by such variations from the contract, plans and

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specifications, and the amount thereof shall be deducted from the first instalment which shall hereafter be paid under said contract.

"5. The said Sayward may call for such evidence and witnesses as he may see fit, and the parties hereto agree to furnish the same, and said Sayward shall certify the result of his findings to each of the parties hereto and shall give one copy to the owners and another to the contractors, and all agree to be bound thereby and to accept the same as final.

"6. The contractors agree that it shall be taken as admitted that they now have all drawings which are needed for the immediate prosecution of the work and will give reasonable notice in advance to the owners' superintendent as to what drawings they shall hereafter require and as to the times when they should be furnished by the owners.

"7. As to said rear wall, the liability of said contractors is to be determined by said Sayward, as hereinbefore provided, but nothing herein contained shall be taken to bind the owners to accept other parts of the work unless all the same are done and completed in accordance with the contract, plans and specifications, or to relieve the contractors from their duty to comply with said contract, plans and specifications, as hereby notified, in all respects.

"Executed in duplicate at Boston, Mass., this fifteenth day of December, 1898.

"All expenses of referring the matters to Sayward, as aforesaid, including the charges of said Sayward, shall be equally borne by both parties; each side to pay its own counsel fees, the charges of any witnesses which it may produce, and the cost of any other evidence which it may offer."

Here followed the signatures and seals of the parties.

The case was referred to an auditor who filed his report on December 31, 1903. At the trial in the Superior Court before *Bishop*, J. the plaintiffs put in evidence the auditor's report and the various exhibits referred to therein which were treated as part of the report, but no further evidence material to the exceptions was introduced by either party.

The auditor's report concluded under the heading "General Findings and Rulings," as follows:

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"I have already found that in several important respects the work done by the plaintiffs under the contract of August 1, 1898, was not done in the manner required by said contract; that various items of work required by said contract were not furnished by the plaintiffs, and that the work was not completed at the times specified in said contract.

"I therefore rule that the plaintiffs are not entitled to recover under said contract or under those counts of their declaration (the first, second, fourth, sixth, seventh and eighth,) based thereon.

"I find that the failure of the plaintiffs to perform said contract was not wilful or intentional on their part and that the work done by them has much benefited the defendants by much increasing the value of the defendants' land on which it was done.

"I therefore rule that the plaintiffs are entitled to recover on the common counts (the third and fifth) of their declaration.

"I find that the value of that work done by the plaintiffs which was work required by the original contract, after deducting the several amounts by which, on account of deviations, omissions and delays, the work was less valuable than it would have been if the contract had been fully performed in all respects, was fully as much as, if not more than, the contract price, and that the value of the defendants' land was increased on account of said work by the amount of said contract price.

"I rule that the plaintiffs are entitled to recover the value of this work, not exceeding the contract price, after deducting the amounts by which the work was less valuable than it would have been if it had been performed in the manner required by the contract.

The contract price was	$59,794.00
It is agreed that the defendants have paid to the plaintiffs or their order,	40,700.00
The balance due, if the contract had been fully performed, would, therefore, have been,	$19,094.00

"The amounts by which the work was less valuable than it

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would have been if the contract had been fully performed are as follows: —

On account of defects in plastering,	$700.00
" " " " " fireproofing,	800.00
" " " " " store entrance platforms,	150.00
" " " omitted lanterns,	250.00
" " " " brick,	391.95
" " " " piles,	100.80
" " " omissions in offices 18 and 19,	30.00
" " " insurance premiums,	245.00
" " " omitted painting,	383.18
" " " " work on rear wall of second story,	173.88
" " " delay in work,	1,430.00
	$4,654.81

" I therefore deduct $4,654.81 from $19,094 and find that the plaintiffs are entitled to recover the balance, viz., $14,439.19 under the third count of their amended declaration.

" In addition to the work required by the contract the plaintiffs did certain other work not required by said contract. I find that the fair value of this work was, as heretofore stated, $3,928.39, and that the value of the building and of the defendants' land on which it was erected was further increased by that amount by reason of said additional work.

" I therefore find that in addition to the amount recovered under the third count of their amended declaration the plaintiffs are entitled to recover the sum of $3,928.39 under the fifth count of said amended declaration.

" If it should be held that said additional work was really done under the article of the contract (Art. III.) providing that the value of alterations, as computed by the owners' superintendent or by arbitration, should be added to the contract price, the plaintiffs could still recover the value of said additional work because the contract price would, by virtue of said article, be expanded by an amount representing the value of said additional work.

" I therefore find that the plaintiffs are entitled to recover under the said third and fifth counts the sum of eighteen

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thousand three hundred and sixty-seven and fifty-eight one-hundredths dollars ($18,367.58) with interest at the legal rate from the date of the writ."

At the close of the evidence it was agreed by counsel for both parties with the consent of the judge that the judge should make *pro forma* rulings on all questions of law in accordance with the rulings of the auditor, either party to be at liberty to save questions of law by excepting to the rulings made or by requesting different rulings and excepting to the refusal of the same.

The judge accordingly instructed the jury at the request of the defendants that the plaintiffs could not recover in any event more than the amount allowed by the auditor plus an additional amount of $160 for extra gas piping which the parties agreed should be allowed, and that the defendants were entitled as a matter of law to all deductions from the contract price made by the auditor.

The defendants further requested the judge to instruct the jury as follows:

2. Upon the facts as found by the auditor and the additional facts agreed to by the parties in regard to the delay in the completion of the building the defendants are entitled as a matter of law to have deducted from the contract price in addition to the deductions made by the auditor the sum of $30 per day for each day from December 1, 1898, to March 1, 1899, and the sum of $10 per day for each day from January 15, 1899, to April 1, 1899, and the total amount found to be due by the auditor should be reduced by the amount of this deduction.

3. Upon the facts as found by the auditor and the additional facts agreed to by the parties in regard to the delay in the completion of the building the defendants are entitled as a matter of law to have deducted from the contract price in addition to the deductions and allowances made by the auditor the sum of $10 per day for each day from May 20, 1899, to October 6, 1899, and the total amount found to be due by the auditor should be reduced by the amount of this deduction.

The judge refused both of these requests but instructed the jury at the request of the plaintiffs that the plaintiffs were entitled to recover the whole amount found due by the auditor plus the $160 above referred to with interest from the date of the

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writ, and a verdict was rendered accordingly. The defendants alleged exceptions.

R. D. Weston-Smith & H. W. Brown, for the defendants.

E. R. Anderson, (*A. T. Smith* with him,) for the plaintiffs.

HAMMOND, J. Although the record is voluminous, only two questions are raised here.

The first respects the validity of the award of Sayward, the referee named in the agreement of December 15, 1898. Under the original contract the time set for the stores and basements was "not later than the first day of December, 1898," and that set for the completion of the whole building was "not later than January first, 1899." Under the agreement of December 15, 1899, these times were changed respectively to the first day of March, and the first day of April, 1899. One of the questions referred to Sayward is stated in the agreement as follows: "The question of what, if any, amount under and by virtue of the terms of said contract should justly and fairly be deducted from the contract price by reason of the said delay, which it is now agreed and admitted is inevitable, and such amount shall be deducted from the next instalment hereafter paid under said contract. And the said Sayward shall consider whether the contractors have suffered because of any fault or delay on the part of the owners in furnishing plans, or in making payments, and if so, shall make proper allowances therefor. But such allowance made to the owners shall not include any such damages to the owners as are referred to in Art. VIII. of the original contract, for which the contractors shall continue to be liable."

The referee heard the parties, and in an elaborate report in which he goes very carefully over the whole matter awards no damages to the owners for this delay.

It is strongly argued by the owners, these present defendants, that the award is invalid upon the ground that it was outside the scope of the submission. It is familiar law that an award made within the scope of the submission is not made invalid by a mistake of the arbitrator as to law or fact. An inspection of the report shows that the arbitrator was guided, as he should have been, by the terms of the contract as he understood them. In the first paragraph of his report he states that the question for

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him was to determine what amount, if any, under and by virtue of the terms of the contract and this agreement "should be justly and fairly deducted from the contract price by reason of said delay." At the threshold of the hearing he ruled clearly that "the terms of the contract could not be waived, for the agreement rested distinctly upon them, and further that a proper conclusion could only be arrived at by using the terms and conditions of the contract as a guide, for they alone indicate what was in view when the contract was made." Further inspection shows that with the contract as his guide he reasoned to his conclusions. He kept within the scope of the submission. Even if he was mistaken in his interpretation of the legal effect of the contract, the award does not thereby become invalid. The parties received what they agreed to take, the honest judgment of the arbitrator as to a matter referred to him.

The second question arises upon the contention of the defendants that for delay in the completion of the building, allowance should be made to them at the rate of ten dollars per day from May 20, 1899, the time to which the auditor computed the allowance, until October 6, 1899, the day upon which the defendants terminated the employment of the plaintiffs and took possession of the building.

The sixth article of the contract, as amended by the agreement of December 15, 1899, required that the stores and basements should first be "completed and delivered, ready for occupancy by tenants," on March 1, 1899, and the whole of the work "fully completed" on April 1, 1899; and it is further provided in this same article as follows: "In case of the failure of the contractor to deliver said stores and basements ready for said occupancy, or to complete the building as aforesaid . . . [at these respective times] . . . the contractor shall forfeit to said owner the sum of thirty dollars per day for each and every day of delay in the delivery of said stores and basements, and ten dollars per day for each and every day of delay in the completion of the remainder of the building," "the forfeits to be deducted from the contract price."

As to the condition of the work of May 20, 1899, the auditor finds that in many places in the walls and ceilings of the first and second stories the plastering was crooked and uneven, that

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this crookedness was visible to the eye without the aid of a "straightedge," or other tools, and was "greater than it should be in good work"; that in other respects "the plastering work was reasonably well done and resulted in a fairly good piece of work." He also finds that "the amount by which the building is less valuable on account of such crookedness is less than would be the cost of making the plastering straight and even." He further finds that an allowance of $700 should be made to the defendants by reason of this defective work. The owners' superintendent was not satisfied with this plastering and ordered the contractor to remove it and replaster, and the auditor finds that "the defendants never waived or abandoned their right to have the plastering made even and straight prior to October 6, 1899, when they terminated the employment of the plaintiffs and took possession of the building," and he further finds that "negotiations between the parties with a view to a settlement of the controversy as to the plastering continued up to said October 6, 1899." On this date, when the defendants took possession, "certain painting work, to wit, the second coat of varnish on the office floors, the painting and tinting of the walls and ceilings of the offices in the second story, the tinting of the ceiling of the second story corridor and the painting of the shutters and outside fire doors had not been done." This work was required by the contract. After taking possession the defendants had this work done by persons other than the plaintiffs, at a cost of $383.18, "which sum fairly represented the value of the work." This sum was deducted by the auditor from the contract price of the building.

The auditor finds that the stores and basements were substantially complete though not, as appears above, in all respects in accordance with the contract, on April 1, 1899, and that the remainder of the work was substantially completed, with the same qualification, on May 20, 1899. In other words, the auditor finds that at the latter date, except as hereinbefore stated, the building was substantially completed. He allows the per diem forfeit of $30 per day from March 1 to April 1, and $10 per day from April 1 to May 20. As to the claim for the forfeiture after May 20, the auditor proceeds as follows:

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"I find that while, as above stated, the stores and basements were substantially completed on April 1st, 1899, (or 31 days after the date fixed for their completion as extended by the agreement of December 15, 1898,) and the remainder of the building was substantially completed on May 20, 1899, (or 50 days after the date fixed for its completion by said agreement of December 15, 1898,) the stores, basements and remainder of the building were not entirely or absolutely completed in strict accordance with the specifications until later dates, and indeed were never so completed. That is to say, the plastering, fireproofing and store entrance platforms have never been made to conform to the requirements of the specifications, and certain comparatively small items, — certain lanterns, and certain painting in the second story offices and corridor and on the outside shutters and fire doors, — have never been furnished by the plaintiffs. Moreover certain shutters and Mason treads were not furnished until some time in July, 1899. Deductions from the contract price on account of all these defects and omissions have been made in this report, and I rule that as the building was substantially completed and ready for occupancy on the above dates, liquidated damages for a delay or failure in completion extending beyond those dates, should not, under the provisions of the contract, be allowed."

In considering this matter it is to be noted that under Article IV. of the contract the owners' superintendent had the authority to condemn the plastering work as unsound and improper, and that it was the duty of the contractors to "take down" the portion of the work so condemned. It is further to be noted that painting to the amount of nearly $400 which was required by the contract never was done by the plaintiffs. Some of this perhaps could not have been done until the question whether the order of the superintendent about the plastering work should be carried out. Instead of insisting that the building was complete and delivering it to the defendants, the plaintiffs retained possession of it and waited until ejected by the defendants. Under these circumstances it is plain that the building, although near completion, was not wholly completed within the meaning of the contract, but was held by the plaintiffs for the purpose of going on if required by the contract. And the auditor's finding

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must be taken to mean only that the building with these exceptions was substantially completed on May 20.

We see no reason why the defendants are not entitled to have the forfeit of $10 a day allowed them to October 6, 1899. There is nothing in *Hall* v. *Crowley*, 5 Allen, 304, upon which the plaintiffs rely, inconsistent with this view.

Exceptions sustained.

SALLY A. WEINSCHENK *vs.* NEW YORK, NEW HAVEN, AND HARTFORD RAILROAD COMPANY.

CARL H. WEINSCHENK *vs.* SAME.

Norfolk. November 22, 1905. — January 5, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Negligence. Railroad.

In an action by a woman against a railroad company for personal injuries incurred while a passenger on a train of the defendant, it appeared that, as the train was approaching a station at which the plaintiff was to alight to take a connecting train and before the brakeman had called the name of the station, the plaintiff started for the platform to be ready to alight, that the door of the car had been left open by a conductor or a brakeman, apparently for purposes of ventilation, that as the plaintiff stepped upon the threshold there was an unusual jolt of the car and to protect herself from falling she took hold of the jamb of the door, and as she stepped upon the platform the door swung to and caught her fingers, causing the injuries. *Held*, that, even if there was evidence that the plaintiff was in the exercise of due care, which was doubted, there was no evidence of negligence of the defendant.

SHELDON, J. These were two actions of tort brought to recover damages for personal injuries to the female plaintiff, the wife of the plaintiff in the second suit. At the trial the presiding judge ruled that on the pleadings and evidence the plaintiffs could not recover, and ordered a verdict for the defendant in each case; and the cases are here on the plaintiffs' exceptions to that ruling. No question, however, was raised as to the pleadings.

There was evidence that on the evening of September 24, 1904, the plaintiffs took a train on the defendant's road at Atlantic, for the purpose of going to Harrison Square, where

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they were to change cars and take another train to Mattapan. They entered the second car of the train and took seats at the front end of the car. The train stopped at Pope's Hill, the last station before reaching Harrison Square, and there a man in uniform, either a conductor or a brakeman, opened the car door, and it remained open without swinging until the plaintiffs left the train. As the train was approaching Harrison Square, just before it stopped and before the brakeman had called the station, the husband arose from his seat and went out upon the platform to alight, and the wife followed him. Just as she stepped upon the threshold, there was an unusual jolt of the car; she felt as if she was swaying forward and going to fall, and she testified that she grabbed the first thing to protect herself, which was the jamb of the door. She stepped on the platform, and then the door closed on her fingers, causing the injuries complained of. It was a comfortably warm evening; the car was well filled; and the air in the car was very close before the door was opened. She testified that she had plenty of time to get the train which she and her husband desired to get at Mattapan; but he testified that he expected to find the connecting train already in the station, did not know how much time they had to get it but did not think it was very much, and he intended to get out without losing any time.

On this testimony, it is at least difficult to say that the female plaintiff was in the exercise of due care. The train had not reached the station, and no call of the station had been made. Trains cannot be run without some jolts, especially in stopping; and this is a matter of common knowledge. She knew that the door was open. There was no evidence that it was fastened back, or that she believed it to be fastened back; and it is generally known that the catches of car doors are not intended to hold them securely against being shut, but only to guard against their being lightly or easily moved. This is all that she would have had a right to infer even if she had believed or known that the door was held by a catch. It has been said that a passenger in a railroad car who is voluntarily standing when there are plenty of vacant seats cannot recover for an accident which it is manifest would not have happened to him if he had been sitting down. *Farnon* v. *Boston & Albany Railroad*, 180 Mass. 212,

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217. See *Worthen* v. *Grand Trunk Railway*, 125 Mass. 99; *Barden* v. *Boston, Clinton & Fitchburg Railroad*, 121 Mass. 426. This woman had voluntarily left the inside of the car and put herself in a position where she might be hurt if she should lose her balance by reason of a jolt of the car.

But however this may be, we do not think that there was any evidence of negligence in the defendant. The jolt of the car was described as an unusual one; but it does not appear to have been due to any defect in track or car, or to any carelessness in the running of the train. *Timms* v. *Old Colony Street Railway*, 183 Mass. 193. *Byron* v. *Lynn & Boston Railroad*, 177 Mass. 303. Nor could it be found that the defendant was careless in the management of the door. Apparently it had been left open by reason of the closeness of the air in the car; and the defendant was not bound to keep it from closing at a time when it was not called upon to anticipate that passengers would be standing upon the threshold or the platform. Nor could it be inferred from the mere closing of the door either that there was a defective fastening or that there had been negligence in putting the door on the catch, for the reasons stated in speaking of the plaintiff's own care. It is not a case to which the doctrine of *res ipsa loquitur* can be applied, as was done in *White* v. *Boston & Albany Railroad*, 144 Mass. 404. It does not appear that this door worked by a spring or catch, as did the window in *Faulkner* v. *Boston & Maine Railroad*, 187 Mass. 254. Nor is there anything to help these plaintiffs in *Gee* v. *Metropolitan Railway*, L. R. 8 Q. B. 161, in which a closed door opened when it ought not to have done so.

There was no evidence that the injuries of Mrs. Weinschenk were due to any negligence of the defendant.

Exceptions overruled.

E. E. Elder, (*J. G. Brackett & A. R. MacKusick* with him,) for the plaintiffs.

C. F. Choate, Jr., for the defendant, was not called upon.

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ANDREW F. ROACH *vs.* BRIDGET ROACH.

Middlesex. November 23, 1905. — January 5, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Marriage and Divorce. Practice, Civil, Judgment or decree.

The libellant in a suit for divorce at any time before the case is tried has the right to have his libel dismissed without a decision upon the merits, and if before trial he files a statement that if the case cannot be continued he "consents that his libel be dismissed, without prejudice, for want of prosecution," the judge has no authority to order the libel dismissed without qualification.

LIBEL FOR DIVORCE, filed March 13, 1903.

The ground for divorce alleged in the libel and in the specifications filed in the case was adultery. The answer of the libellee denied all of the allegations of the libellant, charged him with desertion, and alleged condonation.

In the Superior Court the case came on to be heard before *Bond*, J. on May 31, 1905. The counsel for the libellant read to the judge and filed in the case the following statement of the libellant:

"The libellant being unable to secure the attendance of indispensable witnesses at this present sitting of this court, (if the case cannot be continued,) consents that his libel be dismissed, without prejudice, for want of prosecution."

The judge inquired of the counsel for the libellant whether he had prepared or was ready to prepare an affidavit stating the facts the absent witnesses would testify to if present as the basis of the request for a continuance of the case. To this inquiry the counsel replied that he had not made or filed an affidavit, and that he could not himself make it, as he did not know what the witnesses would testify to, and did not know where they were, and that his client was away. Thereupon the judge ordered that the libel be dismissed generally, and declined to order the libel dismissed without prejudice. The libellant appealed from this order, and alleged exceptions.

C. Cowley, for the libellant.

J. J. Pickman, for the libellee, submitted a brief.

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HAMMOND, J. The trial of the case not having been begun, and no decree or order affecting the rights of the parties having been entered, it was the right of the libellant to have his libel dismissed without a decision upon the merits. See *Hollingsworth & Vose Co.* v. *Foxborough Water Supply District*, 171 Mass. 450; *Carpenter & Sons Co.* v. *New York, New Haven, & Hartford Railroad*, 184 Mass. 98. This in substance he asked to have done. The entry actually made by the judge was "Libel dismissed." The force and effect of this entry is stated by Knowlton, J. in *Bradley* v. *Bradley*, 160 Mass. 258, in the following language: "The entry 'Libel dismissed,' without the addition of the words 'without prejudice,' purports to be a final judgment upon the merits. It is a bar to any further proceedings upon the cause of action set out in the libel. In collateral proceedings it is not conclusive by way of estoppel, or as evidence, except upon matters actually tried and determined; but as a final disposition of that for which the suit was brought, it is, like a judgment by default, conclusive as well in regard to the matters which might have been pleaded as those which were formally put in issue," citing *Foote* v. *Gibbs*, 1 Gray, 412; *Borrowscale* v. *Tuttle*, 5 Allen, 377, 378; *Durant* v. *Essex Co.* 8 Allen, 103, 108; *Thurston* v. *Thurston*, 99 Mass. 39; *Foye* v. *Patch*, 132 Mass. 105, 111.

It is argued by the libellee that the paper filed by the libellant shows that the entry in this case was in accordance with the consent of the libellant as indicated in the paper, but we do not think that this clearly appears in the record. The fair interpretation of the record is that the judge did not intend to make the entry to which the libellant assented, but to make an entry of a different nature and to dismiss the petition generally. This the judge could not properly do against the objection of the libellant. The entry should have been "Libel dismissed without prejudice, for want of prosecution."

Exceptions sustained.

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HENRY T. MASON *vs.* BOSTON AND NORTHERN STREET RAILWAY COMPANY.

Middlesex. November 24, 1905. — January 5, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Negligence. Street Railway.

A passenger on a crowded open electric car who, while moving along the running board toward the rear of the car to get a bundle from under a seat before alighting, is struck on the head by a pole of the railway company, that day negligently placed so as to lean toward the track, may be found to be in the exercise of due care.

A street railway company may be found to be negligent in replacing an old pole standing near the inner rail on a curve of its track with a new pole which, instead of being erect like the old one, leans toward the track, so that the head of a passenger who is moving along the running board of an open electric car facing the rear comes in contact with it.

TORT for personal injuries from being knocked off the running board of an open electric car of the defendant by a pole of the defendant near the track, as the car was passing around a curve on Washington Street in that part of Gloucester called Annisquam. Writ dated October 29, 1903.

At the trial in the Superior Court *DeCourcy*, J. refused to order a verdict for the defendant. The jury returned a verdict for the plaintiff in the sum of $2,000; and the defendant alleged exceptions.

F. N. Wier, for the defendant.

H. J. Winslow, (*H. H. Winslow* with him,) for the plaintiff.

SHELDON, J. The plaintiff was a passenger on an open car of the defendant. The car was a long one, and was crowded when he got upon it, and at first he stood upon the running board on the right hand side of the car. Later he took a position with his back towards the front of the car near the end of the seat which had for its back the partition behind the motorman, with one foot inside the car, and the other hanging over the side of the car. He paid his fare while standing on the running board. The plaintiff's evidence tended to show that when the car was about seventy or seventy-five feet from the place where he intended to alight, he signalled to the conductor; as the

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conductor apparently did not see him and did not ring the bell, he rang the bell himself for the car to stop. Shortly after ringing the bell, he stepped down on the running board and started to walk towards the rear of the car to get a bundle which he had left under the third or fourth seat from the front. While so doing he was struck on the back of his head by a pole of the defendant, thrown down, and injured. This pole had been put in position on the day of the accident, to replace an old pole which had been removed. This new pole was so placed that its foot was not quite three feet from the nearest rail. It slanted toward the track, which was laid here around a curve, this pole being on the inside of the curve. As is usually done, the outer rail of the track was laid higher than the inner rail, thus causing a car in going around the curve to lean towards the pole. By reason of the car and pole each leaning towards the other, the distance between them grew less as the distance above the ground increased, and at the height of seven feet from the ground, which was where the plaintiff's head would be when he was standing on the running board of the car, the distance between the pole and the handles on the outside of the car was less than a foot. The outer edge of the running board was twenty-one inches from the rail; and the distance from the outer edge of the running board to the pole at the ground was one foot and two and a half inches. The old pole had been placed about half an inch farther on the ground from the car than the new one, and had stood straight. The inclination of the new pole was such that seven feet above the ground it was six inches nearer the line of the rail than on the ground. There was evidence that a guard rail on the left side of the car was lowered when the plaintiff got on the car, but that it was afterwards raised; and that a guard rail on the right hand side of the car was not lowered at all, though as to this there was contradictory evidence.

On this evidence the defendant asked the presiding judge to rule that there was not sufficient evidence to warrant a verdict for the plaintiff. The judge refused to do this, and submitted the case to the jury, with instructions not in themselves objected to and not reported. The jury found for the plaintiff, and the case comes before us on the defendant's exceptions to the refusal of the ruling which it requested.

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1. The defendant contends that the plaintiff was not in the exercise of due care. It contends that the plaintiff by stepping upon the running board placed himself voluntarily, without invitation by the defendant and merely for his own convenience, in a place of danger, facing to the rear of the car, and taking no precaution to guard against the danger to which he was exposing himself. See *Cummings* v. *Worcester, Leicester & Spencer Street Railway*, 166 Mass. 220; *Moody* v. *Springfield Street Railway*, 182 Mass. 158. But we think that this was a question for the jury. *Powers* v. *Boston*, 154 Mass. 60. *Fleck* v. *Union Railway*, 184 Mass. 480. It was possible to find that the plaintiff did nothing different from what would have been done by other careful passengers under the same circumstances. *Fleck* v. *Union Railway*, *supra*. Riding on the running board of an open electric car cannot be said to be negligence of itself and as matter of law. Morton, J. in *Moody* v. *Springfield Street Railway*, *ubi supra*. *Cummings* v. *Worcester, Leicester & Spencer Street Railway*, *ubi supra*. He might assume that the defendant had not placed obstructions so near to its track as to make it dangerous for him to prepare to leave its car in the ordinary manner.

The defendant also contends that this case is governed by the doctrine of *Hall* v. *Wakefield & Stoneham Street Railway*, 178 Mass. 98. But the circumstances there considered were very different from those of the case at bar. There the action was brought by a servant against his employer to recover for damages caused by a permanent condition of the employment; this is an action by a passenger against the carrier, and the injury was caused by a pole which had been set up on that very day in such a manner as to be much more dangerous than that which it had replaced. Manifestly the rule of that case cannot be extended to such a case as this.

2. What we have already said is enough to show that this accident properly might be found to be due to the negligence of the defendant. *Cummings* v. *Worcester, Leicester & Spencer Street Railway*, *ubi supra*. Similar questions have been decided in the same way in other courts. See *Elliott* v. *Newport Street Railway*, 18 R. I. 707; *Hesse* v. *Meriden Tramway Co.* 75 Conn. 571; *North Chicago Street Railroad* v. *Williams*, 140 Ill. 275; *S. C.* 40 Ill. App. 590; *West Chicago Street Railroad* v.

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Marks, 82 Ill. App. 185; *Cummings* v. *Wichita Railroad & Light Co.* 68 Kans. 218; *Withee* v. *Somerset Traction Co.* 98 Maine, 61; *Parks* v. *St. Louis & Suburban Railway*, 178 Mo. 108.

The ruling requested could not rightly have been given.

Exceptions overruled.

BYRON R. MITCHELL *vs.* DANIEL T. S. LELAND.

Suffolk. December 5, 1905. — January 5, 1906.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Bankruptcy. Order. Assignment.

If a debtor in the employ of a city gives to his creditor as security an order on the city to pay to the creditor the wages due him for a future month, and afterwards before the wages are due files a petition in bankruptcy and finally obtains a discharge, the discharge is a bar not only to an action for the debt but also to an action against him as drawer of the order, whether the city is liable to the creditor on the order or not.

CONTRACT, the first count on an assignment of wages or order for $116.67 made by the defendant, which is quoted in the opinion, alleging that the plaintiff presented the order to the city of Boston, to which it was addressed, that the city refused to pay it, and that this refusal was caused by the false, fraudulent and tortious acts of the defendant, with a second count for $116.67 for money had and received to the plaintiff's use. Writ dated November 21, 1902.

The defendant, among other defences, pleaded his discharge in bankruptcy. The case was tried before *Aiken*, C. J., without a jury. He ruled, as stated in the opinion, that the discharge in bankruptcy was a bar to the action, and found for the defendant. The plaintiff alleged exceptions.

H. J. Edwards & R. E. Harding, for the plaintiff.

M. L. Jennings, for the defendant.

SHELDON, J. The defendant, on the thirtieth day of June, 1902, owed the plaintiff the sum of $105 on a promissory note given for money lent by the plaintiff to the defendant. The defendant was employed by the city of Boston. On that day, as security

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for this note, the defendant gave to the plaintiff an order dated June 30, 1902, addressed to the city treasurer of Boston, and signed by the defendant, reading as follows:

"Please pay to Mr. B. R. Mitchell, amount of salary due me for the month of August, 1902, as per ferry division pay roll, the same amounting to one hundred sixteen $^{67}/_{100}$ dollars, and oblige. Yours very respectfully."

On August 9, 1902, the defendant filed a petition in bankruptcy in the District Court of the United States, was adjudicated a bankrupt, and, after the bringing of this action, received his discharge in bankruptcy. The defendant named the plaintiff in his schedule of creditors, and described the debt due him as $105 for money borrowed. The plaintiff never appeared in the bankruptcy proceedings, but he had notice of them and might have appeared if he had so desired. The plaintiff filed the order in question with the city treasurer of Boston about the twentieth of August, 1902, before the defendant's August pay day, and the city treasurer still retains it. The exceptions do not show that the defendant ever received the amount of this order, or his pay for August, 1902; but it appears that the city of Boston was summoned in this action as trustee of the defendant, and the plaintiff's brief states that the defendant afterwards dissolved the attachment by giving bond, and then drew the money from the city of Boston.

At the close of the evidence, the defendant waived all other defences and requested the judge to rule that his discharge in bankruptcy was a bar to this action, and that the plaintiff could not recover. The judge so ruled, and found for the defendant, the case being tried without a jury; and the plaintiff has excepted to this ruling.

It may be granted, as argued by the plaintiff, that this order was an absolute transfer to him of the defendant's salary for the month of August, 1902, and that although the principal obligation of $105 can no longer be enforced against the defendant, yet the plaintiff retains his security, and may enforce that for the collection of his debt. It may be accordingly that the plaintiff could compel the city of Boston to pay to him the amount of this order. But he cannot hold the defendant personally liable as the drawer of the order given before the bankruptcy proceed-

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ings were begun; for that is one of the obligations which are barred by his discharge. *Moch* v. *Market Street National Bank*, 107 Fed. Rep. 897. U. S. St. 1898, c. 541, § 63. And the plaintiff does not contend, nor is there any evidence, that the non-payment of the order was caused by any false, fraudulent or tortious acts of the defendant.

Nor does the plaintiff contend that he can recover upon the second count of his declaration upon any other grounds than those already considered. It was not contended at the trial, and has not been argued, that the defendant, before the action was brought, had himself received the amount of this order from the city.

Exceptions overruled.

JOHN F. COSTELO *vs.* CHARLES N. BARNARD.

Suffolk. November 22, 1905. — January 8, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Negligence. Actionable Tort. Pleading, Civil, Declaration.

A declaration, alleging that the defendant, intending to deceive any person to whom it might come, made an instrument in writing purporting to be a negotiable promissory note of a certain town, and unlawfully signed thereto the names of the persons holding the offices of selectmen and treasurer, that the defendant was negligent in the care and custody of this instrument and negligently permitted it to pass from his custody and control, and that the plaintiff in the exercise of reasonable care and diligence took the instrument before maturity for value, thereby suffering loss, sets forth no cause of action, and is bad on demurrer.

If the possessor of an instrument falsely purporting to be a negotiable promissory note, which he has signed in the names of other persons with the intention of deceiving any one to whom it may come, negligently permits the instrument to pass from his custody and control, this, without more, does not make him liable to one who in the exercise of reasonable diligence takes the instrument before maturity for value and thereby suffers loss.

TORT, with three counts. Writ dated June 26, 1902.

The defendant in answer to the first count pleaded a general denial, demurring to the second and third counts on the grounds hereafter stated. At the trial in the Superior Court before *Richardson*, J. the jury returned a verdict for the defendant on

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the first count, finding also in answer to special questions, that the plaintiff did not purchase the note set forth in the declaration in good faith for value and before its maturity, that the defendant did not make the note with fraudulent intent to have it issued as a good and valid note and thereby defraud some person of the value thereof, and that the defendant did not issue the note or put it in circulation with intent to defraud.

The second and third counts of the declaration were as follows:

"Count II. The plaintiff says that the defendant, with the intention and for the purpose of deceiving and defrauding any person to whom it might come, made, contrived and executed a certain written instrument, said instrument purporting on its face to be a negotiable promissory note of the town of Watertown, a town in said Commonwealth, payable on maturity to the bearer thereof, and of the following tenor:

"45 $5,000.00

"Commonwealth of Massachusetts, town of Watertown.

"Know all men by these presents that the town of Watertown in the county of Middlesex and Commonwealth of Massachusetts acknowledges that it is indebted unto the bearer in the sum of $5,000, which it promises to pay to the bearer on the first day of July, A. D. 1902, at the Fourth National Bank in the city of Boston, with interest thereon in the meantime and until the payment of the principal, at the rate of 4 1-2 per cent per annum payable semi-annually on the first day of July and January in each year at the same place upon the presentation of the respective coupon therefor hereto annexed. This note is issued under vote of the town of Watertown passed March 15, 1902.

"Town of Watertown,
"Abraham L. Richards,
Charles F. Fitz,
Edward F. Porter,
"Selectmen of the Town of Watertown.
"Samuel S. Gleason,
"Treasurer.

"Proved and recertified that this note is issued under the authority of the above described vote and conforms to the re-

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quirements thereof; that the total sum borrowed to date including this note is $15,000.

" Watertown, July 1, 1893.

" And the said written instrument was not, as it purported to be, the promissory note of the said town, and the signatures thereto were not the signatures of the persons whose names appear thereon; but the defendant wrote all the signatures thereon, unlawfully and without any right using the names of the persons holding the offices of selectmen and treasurer, respectively, of said town at the time said written instrument purported to issue, and in other respects made said written instrument in imitation of a certain true and genuine and legal promissory note of said town, fraudulently and with the intention of deceiving and defrauding any person to whom said written instrument might come. And the defendant, knowing that said written instrument was similar in appearance to and of the same tenor as a certain promissory note of said town and that any person to whom said instrument might come, though such person used reasonable care and diligence would be deceived and defrauded thereby, and suffer damage therefrom, was careless and negligent in the care and custody of said written instrument and carelessly and negligently permitted said written instrument to pass from his custody and control; and the plaintiff, being in the exercise of due and reasonable care and diligence, before the date on which said instrument purported to mature accepted said instrument as a true and genuine note of said town, and gave therefor good and valuable consideration, and without any fault on his part, but in consequence of the unlawful and fraudulent acts of the defendant as aforesaid, suffered much loss and damage.

" Count III. The plaintiff says that the defendant made and executed a written instrument which in its language and tenor is the same as a certain promissory note duly made and issued by the town of Watertown, a town in said Commonwealth, a copy of which note is hereto annexed marked 'A'; and the defendant, knowing that said note was a negotiable instrument payable to the bearer thereof at its maturity and knowing that said instrument made and executed by him was worthless and

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liable to cause injury and damage to any person who should accept the same for what it purported to be and that person to whom said instrument might come would be deceived thereby, made, contrived and executed the said instrument as a copy of said note carelessly and negligently permitted the said instrument to pass from his custody and control; and the plaintiff, being in the exercise of due and reasonable care, before the date on which said instrument purported to mature, accepted said instrument as a true and genuine note of said town, and gave therefor good and valuable consideration, and, being in the exercise of due care and diligence, through the carelessness and negligence of the defendant, as aforesaid, suffered much loss and damage."

The copy of the note marked "A" was the same as that inserted in the second count.

The defendant demurred to the second and third counts of the declaration, and specified as grounds of demurrer, 1, that neither of these counts set forth a legal cause of action, and, 2, that neither of these counts set forth a legal cause of action substantially in accordance with the provisions of R. L. c. 173.

The judge sustained the demurrer and ordered judgment for the defendant; and the plaintiff appealed.

E. C. Bates, for the plaintiff.

C. F. Choate, Jr., for the defendant, was not called upon.

MORTON, J. This case comes here on appeal by the plaintiff from an order sustaining a demurrer to the second and third counts of the declaration and entering judgment for the defendant. The action is one of tort.

The second count alleges in substance that the defendant, intending to deceive any person to whom it might come, made a written instrument in imitation of and purporting to be a negotiable promissory note of the town of Watertown, and unlawfully signed thereto the names of the persons holding the offices of selectmen and treasurer, and, knowing that any person to whom such instrument might come would be deceived thereby though using reasonable diligence, carelessly permitted it to pass from his custody and control, and the plaintiff being in the exercise of due and reasonable care and diligence took the same before maturity for value.

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The third count omits the allegations that the instrument was made by the defendant with the intent to deceive and defraud any person to whom it might come, and alleges that the defendant knew that it was worthless. Otherwise the allegations are substantially the same as those contained in the second count. A copy of the instrument is incorporated into the second count, and annexed to the third count, and represents an instrument payable to bearer.

We think that the ruling was right. It is manifest that there was nothing harmful in the instrument itself, and the defendant, therefore, owed the plaintiff no duty to prevent its escape or loss. It became harmful to the plaintiff only by the act of some third person which could not be reasonably anticipated and which the defendant was not therefore required to guard against. His knowledge that the note was worthless and his execution of it with the intent to defraud any one to whom it might come do not without anything more render him liable to the plaintiff. In order to render him liable to the plaintiff, some act of commission or some representation or misfeasance on his part which caused the plaintiff to take the note as genuine, is necessary. Mere negligence on his part, though accompanied by a general fraudulent intent in executing the note, is not enough to render him liable. See *Arnold* v. *Cheque Bank*, L. R. 1 C. P. D. 578. It is manifest that no matter how much the defendant may have intended to deceive any one into whose hands the instrument might come, no wrong was done to any one and no possible right of action accrued to any one, so long as the note remained in his own possession and he did nothing to give it currency.

Judgment affirmed.

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MARIA CORNELL *vs.* PATRICK J. MAHONEY.

Suffolk. December 13, 1905. — January 8, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Conversion. Trustee Process. Attachment.

In an action against a common carrier for the alleged conversion of articles entrusted to him for transportation, it appeared that the plaintiff employed and paid the defendant to carry certain boxes, barrels, trunks and a sewing machine to the defendant's office and there to keep them until ordered by the plaintiff to take them to a railroad station for shipment, that the boxes, barrels and trunks contained household goods, wearing apparel, a ten dollar bill and other articles, but that the defendant did not know what they contained, that a few days later the plaintiff made a general demand for the property and the defendant refused to let him have it, saying that the property had been attached and that he would let the law take its course. The defendant offered to show that he had been summoned as trustee in an action in which the plaintiff under a somewhat different name was the defendant, and that he had appeared therein but had not yet been charged or discharged as trustee. The judge excluded the evidence, and ruled that the service of the trustee writ on the defendant and the pendency of the action in which it was served were not a defence to the action for the conversion. *Held*, that the ruling was wrong, it being the duty of the defendant, in spite of the plaintiff's general demand, to keep the goods which had been attached in his hands so that if charged as trustee he could deliver them to the officer to be taken on execution. *Semble*, that, even under a general demand, the plaintiff might have a right to have the sewing machine delivered to him. See R. L. c. 177, § 84, cl. 12.

MORTON, J. This is an action of tort for the alleged conversion by the defendant, under the following circumstances, of certain personal property belonging to the plaintiff. The defendant is a common carrier. On or about April 15, 1903, the plaintiff employed and paid him to carry certain boxes, barrels, trunks and a sewing machine to his office and keep them there until he received orders from her, and then to take them to a railroad depot for shipment to New York. The boxes, barrels and trunks contained household goods, wearing apparel, a ten dollar bill and other articles. A few days later, on April 24, she went to him and made a general demand for the boxes, barrels, trunks and sewing machine, and he refused to let her have them. On cross-examination she testified that he told her that they had been attached and he would let the law take its course.

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There was testimony tending to show that when the defendant received the boxes, barrels and trunks their contents could not be seen, and he did not know what they contained. The defendant offered to show by the records of the Municipal Court of Boston that on the twenty-third day of April, 1903, he was summoned as trustee in an action wherein one Martha J. Kearney was the plaintiff and one Ellen Cornell was the defendant, and that the action was duly entered on the return day, and he had appeared therein and had not been charged or discharged. There also was evidence that the Ellen Cornell in the trustee suit is the Maria Cornell of this action. The judge refused to allow the records of the Municipal Court to be introduced in evidence, and ruled that the service of the trustee writ upon the defendant and the entry and pendency of that suit in that court did not constitute a defence to the present action. The defendant excepted to the exclusion of this evidence and to the ruling. There was a verdict for the plaintiff, and the case is here on exceptions by the defendant to the exclusion of the evidence thus offered and the ruling thus made, and to the refusal to give certain instructions that were requested.

We think that the ruling was wrong and that the evidence should have been admitted. If, as there was evidence tending to show, the defendant in the trustee suit was the same person as the plaintiff in this action, then the effect of the service of the trustee process upon the defendant was to attach in his hands, so far as they were subject to attachment, the very goods which he is now charged with having converted to his own use because he declined to give them up after they had been so attached. The goods having been attached in his hands, he was bound to keep them, so that, if charged as trustee by reason of their possession, he could deliver them to the officer to be taken on execution (R. L. c. 189, § 57), and, in the absence of collusion between himself and the attaching creditor, he could not be deemed guilty of conversion for so doing. *Clegg* v. *Boston Storage Warehouse Co.* 149 Mass. 454. *Adams* v. *Scott*, 104 Mass. 164. *Stiles* v. *Davis*, 1 Black, 101. What the result would have been if the plaintiff had in her demand specified certain articles, if there were any such, which were clearly exempt from attachment, need not be considered, since the demand was

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a general one, and the defendant was justified in treating it as a demand for a return of all of the goods whether exempt or not. And if the exempted articles were intermingled by the plaintiff with articles not exempt and packed in boxes, barrels and trunks in such a way that the defendant was unable to distinguish from the demand or otherwise articles not exempt from those that were exempt, the defendant would not be at fault for not delivering to the plaintiff articles, if any there were, which were exempt from attachment. *Nash* v. *Farrington*, 4 Allen, 157. *Stevenson* v. *White*, 5 Allen, 148. *Clapp* v. *Thomas*, 5 Allen, 158. *Eager* v. *Taylor*, 9 Allen, 156. *Woods* v. *Keyes*, 14 Allen, 236. *Dow* v. *Cheney*, 103 Mass. 181. This, perhaps, would not excuse him from failing to deliver, even under a general demand, articles like a sewing machine * for instance which had a separate identity and were easily distinguishable from others, and were clearly exempt from attachment. *Copp* v. *Williams*, 135 Mass. 401. But the case was not tried on any such view of the law; but on the view that the only effect which could be given to the trustee suit was to secure by means of it a continuance of this action until the trustee suit had been disposed of. For reasons already given we think that this was erroneous.

Exceptions sustained.

J. W. Converse, for the defendant.
James Ballantyne, for the plaintiff.

ROBERT WEITZE *vs.* HARRY L. BURRAGE & others.

Suffolk. December 5, 1905. — January 10, 1906.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Equity Jurisdiction. Corporation.

A bill in equity by the holder of a voting trust certificate representing common stock in a corporation, to set aside a sale of the common stock or of the voting trust certificates representing it by a protective committee of the certificate

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* See R. L. c. 177, § 84, cl. 12.

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holders, in which a director who was the financial manager of the corporation has been made a defendant, cannot be maintained against such manager merely on an allegation that he mismanaged and crippled the business of the corporation so as to reduce the market value of the certificates and induce the protective committee to make the sale complained of, there being no allegation that the manager and the protective committee were acting in collusion to sell the stock below its value or for any other unlawful purpose, or that there was any concert between the manager and the purchaser of the stock, or that the manager had any interest in the purchase, the alleged fraud on the part of the manager not being connected in any way with the relief prayed for.

A bill in equity by the holder of a voting trust certificate representing common stock in a corporation, to set aside a sale of the common stock or of the voting trust certificates representing it by a protective committee of the certificate holders, alleged that a "pooling agreement," creating the protective committee and defining their powers, authorized that committee "to negotiate in behalf of the owners for the sale of the pooled stock, and . . . to agree to sell not less than two thirds of the pooled stock at such price as may be approved in writing by owners representing two thirds of the pooled stock," that the committee made an agreement, subject to the assent of the owners of the pooled stock, to sell all or at least not less than two thirds of the pooled stock at a certain price per share, that before executing this agreement the committee sent to the certificate holders a notice of the offer to purchase the stock, naming the price but not purporting to state, and not stating, all of the terms of the agreement, enclosing a card on which was printed an authorization of the sale of the stock by the committee at the price named, which was signed and returned by the plaintiff and the other certificate holders. There was no averment that the members of the committee were not ready to give or did not give full information as to the proposed sale to any certificate holder who desired it, and no averment that the price was inadequate or that it was below either the market value or the intrinsic value of the stock, or that a higher price could have been obtained from any other purchaser, or that the bargain was not an advantageous one for the stockholders, and the agreement, a copy of which was annexed to the bill, was not unreasonable upon its face. On demurrer, *held*, that the bill disclosed no ground for equitable relief.

BILL IN EQUITY, filed, as amended and substituted by consent and leave of court, on February 11, 1905, by Robert Weitze of Cambridge and such other holders of voting trust certificates of the common stock of John P. Squire and Company, a corporation, as might become parties thereto, against Harry L. Burrage and Russell A. Ballou of Newton, Edwin C. Swift of Beverly, the City Trust Company, a corporation, and Edward K. Hall and James S. Murphy of Boston, Edward P. Shaw of Newburyport, John G. Massie of Providence in the State of Rhode Island, and James M. Steadman of Portland in the State of Maine, constituting the protective committee of the pool of John P. Squire and Company common stock under a declaration or agreement of trust dated February 5, 1903.

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The bill was brought to set aside a sale of voting trust certificates of the common stock of the John P. Squire and Company corporation made by the protective committee to the defendant Ballou by an agreement in writing dated October 30, 1903. The averments of the bill are described in the opinion. The prayers of the bill were as follows:

First. That the court should issue an injunction enjoining and restraining the defendant trust company from delivering the voting trust certificates to the protective committee, or to the defendant Ballou, or to their nominees until the further order of the court, and from paying over to the protective committee or to any person, until the further order of the court, the sum of $25,000 deposited with it under the agreement of sale, or any other sum of money which it had received on account of the pretended agreement of sale from the defendant Ballou or the defendant Swift or their attorney or agent.

Second. That the individual defendants comprising the protective committee should be enjoined and restrained from carrying out or attempting to carry out the pretended agreement of sale with the defendant Ballou, or with his nominee, or any agent or attorney of Ballou.

Third. That the pretended agreement of sale should be adjudged invalid and of no effect upon the rights of the plaintiff and other creditor stockholders, depositors under the protective committee agreement.

Fourth. That the defendant Burrage should be decreed to pay the costs of the suit.

Fifth. That such other and further relief might be granted to the plaintiff as justice and equity might require.

The agreement, called the pooling agreement, which created the protective committee and defined their powers was dated February 5, 1903. This agreement was signed by the members of the committee and by the owners of the voting trust certificates of the common stock of John P. Squire and Company. The fourth article of this agreement, which is referred to in the opinion, was as follows:

"4. The committee is authorized to negotiate in behalf of the owners for the sale of the pooled stock, and is further authorized to agree to sell not less than two thirds of the pooled stock at

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such price as may be approved in writing by owners representing two thirds of the pooled stock.

"Provided, however, the committee shall make no agreement to sell any part of the pooled stock which does not entitle all of the owners of the pooled stock to sell at the price authorized by the owners of two thirds of the stock as aforesaid.

"To such owners of pooled stock as do not in writing within ten days after notice from the committee signify their desire of selling their stock at the price authorized by the owners of two thirds of such stock as aforesaid, the committee shall send an order on the depositary, directing the return of such owner's stock upon surrender of his voucher therefor. Failure by any owner to notify the committee within ten days of his desire to sell his stock at the price authorized by the owners of two thirds of the pooled stock as aforesaid, shall be considered as a waiver of all rights under the provisions of this agreement."

The agreement of sale which the bill sought to set aside was as follows:

"Memorandum of Agreement between Russell A. Ballou, his successors or assigns, party of the first part, and Edward K. Hall, James S. Murphy, John G. Massie, E. P. Shaw, and James M. Steadman, their successors or assigns, hereinafter called the Committee, parties of the second part, and the City Trust Company of Boston, its successors or assigns, hereinafter called the Trust Company, party of the third part.

"Whereas there is deposited in the City Trust Company under the terms of a so-called pooling agreement, dated February 5, 1903, between said committee and various common stockholders of John P. Squire & Company, approximately twenty-eight thousand shares of the common stock of John P. Squire & Company, or certificates entitling the holders thereto, hereinafter referred to as stock, and,

"Whereas the said Ballou is ready to purchase all of said pooled stock, or any part thereof, not less than fifteen thousand shares, and,

"Whereas said committee is ready to sell to said Ballou at said price such part of said pooled stock as they may be lawfully authorized to sell under the terms of said pooling agreement;

"Now therefore in consideration of the premises and in the

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further consideration of the mutual promises and agreements hereinafter set forth, the parties hereto agree as follows:

"1. The said Ballou agrees to purchase all of said stock which the said committee may be authorized to sell, and pay therefor the sum of fourteen dollars ($14.00) per share, provided, however, that the said Ballou will not accept or purchase an amount of less than fifteen thousand shares. This offer is to remain open for acceptance by the committee until 6 P. M. November 3, 1903. If on or before said time the committee by writing delivered to said Ballou at No. 35 Federal street, in said Boston, notifies the said Ballou that they will sell and deliver, under the terms hereof, shares of said stock exceeding fifteen thousand shares in amount, this contract and all the terms thereof shall become binding upon the parties hereto, and the said Ballou agrees to accept and pay for the number of shares named in said writing, under the terms hereof.

"Said Ballou further agrees to accept and pay for, under the terms hereof, within twelve (12) days from said date, any part or all of the balance of said pooled stock which the committee may agree to sell within said twelve (12) days.

"The payments for stock agreed to be sold under the terms hereof shall be made to the City Trust Company as follows: Within twenty-four (24) hours after the total amount of stock to be delivered by the committee under the terms hereof shall have been ascertained and communicated to said Ballou at said address, in writing, the said Ballou shall deposit with the City Trust Company an amount of cash equal to $3.50 per share for all stock agreed to be delivered; a second payment of an amount equal to $3.50 per share shall be deposited with the City Trust Company thirty (30) days thereafter; a similar amount sixty (60) days thereafter, and a similar amount, or the final payment, shall be deposited ninety (90) days thereafter. Interest at five per cent. from the date of the first payment shall be added to the respective amounts deposited on the second, third and fourth payments.

"The said Ballou agrees to deposit with the City Trust Company, upon the execution of this agreement, the sum of twenty-five thousand dollars ($25,000). This amount is to be forfeited to the committee for the benefit of their depositors if the said

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Ballou fails to make the first payment of $3.50 per share, as hereinabove provided; but if said payment is made in accordance with the terms hereof, said twenty-five thousand dollars ($25,000) shall be applied to and considered as a part of said payment. In case the committee fails to secure the necessary authority as aforesaid, to sell to the said Ballou under the terms hereof, any part of said pooled stock, then the trust company shall return said twenty-five thousand dollars ($25,000) to the said Ballou.

"In case there is a default of more than ten (10) days on the part of the said Ballou in making either the second, third or fourth payments, as hereinbefore set forth, the total amount of the first payment shall be forfeited to the committee for the benefit of their depositors, the balance of payments, if any, shall be returned to said Ballou, said Ballou shall forfeit all his right hereunder, and the trust company is authorized to pay over all moneys so forfeited to the committee.

"The said Ballou further agrees to pay to the committee on the date of the last payment, as hereinbefore set forth, a sum not to exceed thirteen hundred dollars ($1300), the expenses of the committee in connection with the said pool; the purpose of this clause being to provide for such stockholders as may sell their stock under the terms hereof, a price of fourteen dollars ($14.00) net, without any assessment for expenses. A *pro rata* deduction from said amount shall be made for all shares not sold under the terms hereof.

"2. The committee agrees to sell and deliver to said Ballou, under the terms hereof, all shares of stock which they may be legally authorized to so sell and deliver under the terms of said pooling agreement.

"3. The trust company agrees to accept all moneys deposited with it by the said Ballou, and to pay out the same as and when requested by the committee under the terms hereof.

"4. Within a reasonable time after final payment is made to the trust company, the committee shall cause to be surrendered to the trust company the receipt vouchers issued by the trust company to the depositors of stock, and upon delivery of such vouchers to the trust company, the company shall deliver to Ballou or his order the respective stock released thereby, and

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pay to the depositors of such stock the purchase money therefor; provided that cash deposited for the purchase of stock, receipt vouchers for which are not surrendered within ninety (90) days after the final payment, shall be returned to said Ballou.

"Details of transfer of the stock are to be agreed upon by the parties hereto after the first payment is made to the trust company.

"5. It is understood that in this agreement the committee are acting not as principals but as agents representing owners of the pooled stock, and the committee assume no individual liability of any nature whatsoever by reason of the execution of this agreement.

"In Witness Whereof the parties hereto have hereunto set their signatures this thirtieth day of October, 1903.

"Executed in triplicate."

Here followed the signatures of Ballou, of the five members of the protective committee, and of the City Trust Company by its treasurer.

Before the foregoing contract was executed the protective committee sent to the holders of the voting trust certificates the following communication:

"October 30, 1903.

"To the Depositors:

"Your committee has to-day been offered fourteen dollars ($14) per share net for the pooled stock; twenty-five thousand dollars cash to bind the bargain has been deposited with the City Trust Company. This offer must be accepted or rejected on or before November third.

"If you wish to have your stock sold at this figure, fill out the enclosed card and send it in by *return mail.*

"Your committee unqualifiedly recommends the acceptance of the offer, and the majority of the depositors have already authorized your committee to accept the offer.

[Signatures of the members of the protective committee.]

"In signing the enclosed card be careful to sign in the same name which appears on your certificate."

The card referred to was signed and returned by the plaintiff and the other certificate holders, and was as follows:

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"Protective Committee.
"Pool of Common Stock of John P. Squire & Co.
"James S. Murphy, John G. Massie, E. P. Shaw, James M. Steadman, E. K. Hall, Protective Committee,
"Room 714, 101 Milk Street, Boston.

"Gentlemen: You are hereby authorized to sell the John P. Squire & Co. stock or certificates deposited in the pool of the Protective Committee at the City Trust Company, Boston, by the undersigned, at such price as may be agreed upon by your committee, and such price is hereby approved by the undersigned. Not less than $14 net.

"This authority is given in pursuance of and subject to the provisions of the pooling agreement of February 5, 1903, between your committee and the undersigned and all other depositors.

"Oct. 1903."

All of the defendants demurred to the bill for want of equity, demurrers being filed respectively for the defendant Burrage, for the members of the protective committee, for the defendant Ballou, and for the defendant Swift.

The case came on to be heard before *Hammond*, J. upon the amended bill of complaint, and the demurrers thereto. The justice sustained the demurrers and ordered that the bill be dismissed. At the request of the plaintiff, he reported the case for determination by the full court.

W. B. Farr, for the plaintiff.

J. B. Warner, for Burrage.

J. Abbott, for Ballou.

F. Hutchinson, for Swift.

H. W. Dunn, for the protective committee.

SHELDON, J. We are of opinion that the demurrers of the respective defendants must be sustained.

No relief is sought against the defendant Burrage except that he be held for the payment of costs. The object of the bill is to set aside the agreement for a sale of the stock or voting trust certificates of John P. Squire and Company, a corporation, which has been made by the five last named defendants, called the protective committee, with the defendant Ballou, on the ground

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that the committee had no authority to make that agreement, and that it secured the assent of the owners of the certificates to the agreement by withholding from them information to which they were entitled and through the lack of which they were induced to give an assent which otherwise they would not have given. Burrage is not a party to this agreement. The bill charges that he, being a director and the active manager of the finances of the corporation, with the intent to secure the control of the business and the capital stock for the defendant Swift, mismanaged and crippled its business so as to reduce the market value of the certificates and induce the protective committee to make the agreement in question with Ballou, who was really acting for Swift, as the bill alleges.

Plainly, if these averments of the bill are true, the company, or, if the defendant Burrage was able by his control to prevent action by the company, then the individual stockholders, would have a remedy against him for these wrongful acts. *Warren* v. *Para Rubber Shoe Co.* 166 Mass. 97. *Brewer* v. *Boston Theatre*, 104 Mass. 378. But this bill is not brought to obtain such a remedy against him; it has neither the necessary parties nor the necessary averments for that purpose; and no contention is made in argument that it can be supported upon that ground. See *Doherty* v. *Mercantile Trust Co.* 184 Mass. 590; *Dunphy* v. *Traveller Newspaper Association*, 146 Mass. 495. Nor is it alleged or contended that Burrage and the protective committee were acting in collusion to sell the stock below its value or for any other unlawful purpose, or that there was any concert of action between him and either Ballou or Swift, or that he had any interest in the purchase by either of them. His alleged frauds are in no way connected with the action of the protective committee which is complained of. The only charge against him is that he was guilty of a breach of trust not connected in any way with the relief which is prayed for. It is clear that the bill cannot be maintained against him.

As to the other defendants, the main question is whether on the averments of the bill the agreement made by the protective committee for the sale to Ballou of the pooled stock was within the powers conferred upon the committee by the agreement of February 5, 1903; and it seems plain to us that it was. That

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agreement by its fourth clause expressly authorized the committee "to negotiate in behalf of the owners for the sale of the pooled stock," and this is not cut down by the further authority given to sell not less than two thirds of such stock at such prices as might be approved in writing by the owners. The agreement with Ballou is especially limited to such stock as the committee may be authorized to sell. Nor does the notice sent to the owners of the pooled stock in any respect misstate the terms of the bargain made. It does not state the whole of such terms; but it does not purport so to do, and there is no averment or contention that the members of the committee were not ready to give or did not give full information as to the terms of the proposed sale to any stockholder who desired it. Nor is there any averment in the bill that the price was inadequate, or that it was below either the market value or the intrinsic value of the stock at the time when the bargain was made or ever since, or that a higher price could have been obtained from any other purchaser, or that the bargain was not an advantageous one for the stockholders. Nor can it be said that the terms of the agreement made with Ballou are so onerous upon the stockholders as to warrant the court in interfering. Their principal effect is to liquidate the damages to be paid by Ballou in case of default by him after the contract should have become binding; and we see nothing in this stipulation which is either unreasonable upon its face or liable to result injuriously to the stockholders. An agreement which secured $25,000 at once and a payment of one fourth of the whole price within twenty-four hours, upon pain of forfeiture, cannot be said to have been unreasonable, from the standpoint of the vendor. Even if the agreement be so construed as to give for a time an option to Ballou, it is not so given as to be beyond the authority given to the committee by the fourth article of the protective agreement; and at any rate it appears by the bill that if there was originally any option the parties thereto proposed to execute it fully and complete the bargain when the bill was filed. Nor do we see that it was material that Ballou was in fact acting for Swift in making his purchase. This is not averred to have been known to the members of the protective committee; and according to the averment of the tenth paragraph of the bill, it was not any

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purchase by Swift, but only one at an inadequate price that was to be guarded against; and, as we have already pointed out, this price does not appear to have been inadequate.

The bill fails to show a case entitling the plaintiff to the relief sought.

According to the terms of the report, the order must be

Demurrer sustained; bill dismissed.

THOMAS F. MALOY *vs.* CHRISTIANA HOLL & another.

Suffolk. December 7, 1905. — January 10, 1906.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Covenant. Deed.

In 1897 the defendant conveyed to the plaintiff certain land on or near Columbus Avenue in Boston by a quitclaim deed covenanting against all incumbrances made or suffered by the grantor. In 1895 the city of Boston under St. 1894, c. 416, by valid orders laid out an extension of Columbus Avenue, affecting the land in question. The work of construction under these orders, which began before the defendant gave the deed to the plaintiff and was completed in 1899, was done in violation of the statutes applying to it and no valid assessments for betterments could be made for it. St. 1902, c. 527, authorized the street commissioners to assess betterments for work completed within the six years next preceding the passage of the act, and under this statute the street commissioners imposed a valid assessment on the land for the work completed in 1899, which the plaintiff paid. *Held*, that the defendant was not liable for breach of covenant as at the time the deed was given there was no incumbrance.

SHELDON, J. This case comes before us on the report of a judge of the Superior Court upon the bill, answer and statement of agreed facts.

It appears that on the twenty-third day of April, 1897, the defendant Holl, who is hereinafter called the defendant, conveyed to the plaintiff land in the vicinity of Columbus Avenue in Boston, by quitclaim deed of that date, containing a covenant that it was free from all incumbrances made or suffered by her. The plaintiff contends that on that day the land was subject to a betterment assessment under an order of the street commissioners of the city of Boston, passed on January 4, 1895,

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and the bill is brought under R. L. c. 159, § 8, cl. 7, to enforce the liability of the defendant for the breach of her covenant.

In 1895, before the defendant made her conveyance, the street commissioners of the city of Boston, acting under the authority of St. 1894, c. 416, by valid orders laid out the extension of Columbus Avenue, and proceeded to do the necessary work therefor; but the work of construction was not done in conformity with the requirements of the statutes as to the letting of contracts and otherwise, so that abutters could not be made liable for the payment of betterment assessments; and if any such assessment had been made, the abutters could have had it quashed on certiorari. *Warren* v. *Street Commissioners*, 181 Mass. 6. The work of construction was begun before the defendant gave her deed to the plaintiff, and was completed in 1899, subsequent to the giving of this deed. In 1902, the Legislature passed an act allowing the street commissioners to make betterment assessments for work completed within the six years next preceding the passage of the act; St. 1902, c. 527; and on January 3, 1903, the board of street commissioners assessed upon the land described in the plaintiff's deed the sum of $326, and the plaintiff has paid this assessment.

It is not disputed that the assessment of January 3, 1903, was valid as against one who owned the land assessed at the dates of both the orders of construction and of assessment. *New England Hospital for Women and Children* v. *Street Commissioners*, 188 Mass. 88. *Warren* v. *Street Commissioners*, 187 Mass. 290. And it is settled that by the passage of an order laying out a highway or ordering its widening or alteration, a lien attaches to the property to be assessed for a betterment, though the amount due upon such lien is uncertain until the completion of the work and the making of the assessment, and the existence of this lien is an incumbrance upon the land and constitutes a breach of the covenant against incumbrances in a deed given after the passing of the order for the laying out or widening, but before the actual making of the betterment assessment. *Blackie* v. *Hudson*, 117 Mass. 181. And this would be so, even though the assessment were technically invalid, if the proper officers could correct the error by proceedings in due form, and

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reassess the same amount upon the land, and sell the land if this same amount was not paid. *Coburn* v. *Litchfield*, 132 Mass. 449. *Smith* v. *Abington Savings Bank*, 171 Mass. 178, 186. It is the liability to assessment that constitutes the incumbrance; and the liability is an incumbrance upon the land when it accrues, even though its amount may not be known and the present right of enforcement may not come into existence until the assessment is afterwards made. *Carr* v. *Dooley*, 119 Mass. 294. *Blackie* v. *Hudson*, *ubi supra*. *Prince* v. *Boston*, 111 Mass. 226. *Jones* v. *Aldermen of Boston*, 104 Mass. 461. Accordingly the lien on the defendant's land, its liability to be assessed for this extension of Columbus Avenue, accrued in 1895; and this constituted an incumbrance upon the land in April, 1897, when she gave her deed, if an assessment could then be laid under the St. of 1894, under which the work was done. If the work of construction had been so done that such an assessment could be laid, and if this action were for the recovery of such an assessment, the plaintiff's case would be made out.

But it appears that no such assessment could be laid, and that the lien upon the defendant's land, under the laws in force when she gave her deed, had ceased to be a lasting incumbrance. Her covenant against incumbrances, if broken at all, was broken as soon as it was made. *Bailey* v. *Agawam National Bank*, *ante*, 20, decided since this case was argued. *Whitney* v. *Dinsmore*, 6 Cush. 124, 127, 128. But when she gave her deed, there was no valid incumbrance upon her land for this assessment, nor could there be any under the statutes then in force. The street commissioners had no power to make any assessment for this construction. *Warren* v. *Street Commissioners*, *ubi supra*. For the same reason they had then no power to make a reassessment, as might have been done in *Coburn* v. *Litchfield* and *Smith* v. *Abington Savings Bank*, *ubi supra*. The assessment now in question, whether called a reassessment or not, was laid under St. 1902, c. 527; the power to lay it is derived wholly from that statute; the liability to pay it and the lien upon the land for its collection could not have existed in 1897, when the rights of these parties became fixed.

We are of opinion that the incumbrance of which the plaintiff complains was not in existence when he received his deed from

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the defendant, and so constitutes no breach of her covenant against incumbrances therein contained.

Bill to be dismissed.

P. D. Morris, for the plaintiff.

W. Bolster, for the defendant Holl.

H. Wheeler, for other persons similarly interested, filed a brief by leave of the court.

CHRISTIAN W. MOECKEL *vs.* C. A. CROSS AND COMPANY.

Worcester. October 3, 1905. — January 13, 1906.

Present: KNOWLTON, C. J., LATHROP, HAMMOND, LORING, & BRALEY, JJ.

Nuisance. Negligence. Evidence. Landlord and Tenant. Practice, Civil, Exceptions.

One maintaining a nuisance by carrying on a business contrary to the provisions of a statute is liable to a person injured by the nuisance.

In an action for injuries to greenhouses occupied by the plaintiff and to plants and flowers therein from an explosion on premises of the defendant, it appeared that the defendant maintained a building upon its land for the storage or keeping of gasoline and kerosene, two of the products of crude petroleum, in violation of the provisions of R. L. c. 102, §§ 113, 114, that in the rear of the building were three large iron tanks used for keeping kerosene and gasoline, which were fitted with pipes running to the large filling room of the defendant's building through which oil was drawn from the tanks, that a small room was partitioned off which was used for gluing barrels, that there was a boiler in the small room in which a fire was built when gluing was done, and that the two rooms were connected by a door which closed automatically, that this door was hung on trucks at the top, was not stable at the bottom and would swing out from the bottom, that the barrels were filled with gasoline through an automatic faucet which shut off with a spring, that it did not always close properly and then the gasoline would run over, that a lamp was used for heating glue and generally was kept lighted, that there was always a strong smell of gasoline and kerosene about the room and a good many feet from it, that on the morning of the explosion in which the plaintiff's property was injured, a servant of the defendant was engaged in gluing barrels, that in the explosion the defendant's servant was killed and near his body was found the body of a man not in the employ of the defendant. *Held*, that the jury were warranted in finding both that the defendant was maintaining a nuisance, and that it was conducting its business in a negligent manner.

Judicial notice will be taken of the fact that kerosene is a product of crude petroleum.

A lessee of greenhouses can recover for their injury from an explosion caused by the fault and negligence of another, although his lease contains a provision

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under which he is not bound to repair damage caused by fire or other unavoidable casualties.

Where a party to an action asked for certain rulings which were refused properly by the judge because too broad, and excepted to the refusal, but did not except to any part of the judge's charge, this court in dealing with the exceptions has no occasion to consider whether the rulings given were correct or not.

LATHROP, J. This is an action of tort for injuries occasioned to certain greenhouses occupied by the plaintiff, and to plants and flowers therein, from an explosion upon the premises of the defendant on March 21, 1904. The declaration in one count alleged negligence, and in the other the maintenance of a nuisance. In the Superior Court the jury returned a verdict for the plaintiff, and the defendant alleged exceptions to the refusal of the presiding judge to give certain rulings requested. There is no exception to any part of the charge.

The rulings requested were as follows:

"1. Upon all the evidence the plaintiff cannot recover.

"2. Upon the evidence the plaintiff is not the owner of the greenhouses and cannot recover for the damages to the same.

"3. Upon the evidence the plaintiff is not the owner of the greenhouses and cannot recover for any permanent injury to the same.

"4. The plaintiff has not shown that he was under any obligations to make repairs for damage caused to the greenhouses by the explosion, and cannot recover the cost of restoring the same to their former condition.

"5. There is no evidence that kerosene or gasoline was kept or stored in any building in violation of the statute."

The first request clearly could not have been given. There was evidence in the case that the defendant was maintaining a building upon its land for the storage or keeping of two of the products of crude petroleum, namely, gasoline and kerosene, without a license, in violation of the provisions of the R. L. c. 102, § 114, and that an explosion took place.

The building in which the explosion took place was sixty feet long by thirty feet wide. It was authorized to be built by the mayor and aldermen of Fitchburg in September, 1901, for the storage of oil. By the terms of the license it was to be five hundred feet from any dwelling house, and the tanks were to be located outside the storehouse. This license by the terms of the

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R. L. c. 102, § 114, was to continue only until "the first day of April next succeeding the date thereof." The license was not renewed, nor was the building "properly ventilated" as required by § 113 of the same chapter, as it was not ventilated at all. The exceptions state that in the rear of the building were three large iron tanks which were not enclosed by any building or in any way covered; that at the south end of the building a small room was partitioned off, which was used for gluing barrels. There was a boiler in the small room, in which a fire was built whenever gluing was done. The two rooms were connected by a door which closed automatically when opened. The iron tanks were used to keep kerosene and gasoline, and were fitted with pipes running to the large filling room in the building, through which pipes the oil was drawn from the tanks.

There was evidence that the defendant's servant was engaged in gluing barrels on the morning of the accident; that the door which closed automatically was hung on trucks at the top, and was not stable at the bottom, and would swing out from the bottom. There was also evidence that the method of filling the barrels with gasoline was through an automatic faucet, which shut off with a spring; that it did not always snap off, and then it would run over. It further appeared that there was a lamp used for heating glue, which generally was kept lighted; and that there was always a strong smell of gasoline and kerosene about the room, and "a good many feet from it."

In the explosion the defendant's servant was killed, and close to his body was found the body of a man not an employee of the defendant. The defendant contends that this man might have caused the explosion; but there is no evidence of this, and the jury were warranted in finding both that the defendant was maintaining a nuisance and was carrying on the business in a negligent manner.

With this subject may be considered the fifth request. There was evidence that usually some filled barrels of kerosene were kept in the filling room, but not very much gasoline, sometimes not any. There was evidence that gasoline is a product of crude petroleum, but there was no direct evidence that kerosene is such a product; and the defendant seriously makes this point in his

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brief. This however is a matter of common knowledge. This request was rightly refused.

That a person carrying on a business contrary to the provisions of a statute is liable to a person injured thereby is well settled. *Quinn* v. *Lowell Electric Light Co.* 140 Mass. 106. See also *Murtha* v. *Lovewell*, 166 Mass. 391.

The second, third and fourth requests may be considered together. The greenhouses in question were about twenty-five years old, and were located on land owned by one Sawyer. They were built on brick foundations which went below the ground, with boilers and piping for steam heat. There were four large and three small hothouse buildings. Two of the hothouses, called lean-tos, were connected with a larger hothouse structure, and formed practically one greenhouse. This building was connected with the plaintiff's house, and there was evidence that more injury was done to this greenhouse than to the others. This greenhouse was held under a lease from one Sawyer, which will be hereinafter referred to. The other hothouse, or lean-to, was connected with three other hothouses or greenhouses, and was about seventy-five feet from the greenhouse connected with the plaintiff's building. These the plaintiff claimed to own under a bill of sale from one Liversage, a former tenant of Sawyer. This bill of sale was of three greenhouses, "together with the boiler, piping, apparatus, and fixtures used in and connected with said greenhouses; and all the stock of plants, bulbs, coal, flower pots, vases, wire designs, paper, boxes, two show cases, tools and implements now owned by me and in said greenhouses. Also one show case and one stove now in the building used by me as an office and situate near the above named greenhouses. Also the good will of the florist business heretofore carried on by me at said greenhouses."

The lease from Sawyer was for the term of three years from July 1, 1902, and contained the following provisions: "That the lessor shall give at least four months' notice to lessee should he require or undertake the removal of the greenhouses abutting on Summer Street unless otherwise mutually agreed, but said removal shall not take place in winter. The lessee is to paint or glaze all hot or greenhouses and keep them in first-class condition. That all improvements made by lessee shall immediately

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become the property of the lessor." The lease contained the covenant that the lessee should "deliver up the premises to lessor at the end of the term in as good order and condition, reasonable use and wearing thereof, fire and other unavoidable casualties excepted, as the same now are." And also the following provisions: "And provided also, that in case the premises, or any part thereof during said term, be destroyed or damaged by fire or other unavoidable casualty, so that the same shall be thereby rendered unfit for use and habitation, then, and in such case, the rent hereinbefore reserved, or a just and proportionate part thereof, according to the nature and extent of the injuries sustained, shall be suspended or abated until the said premises shall have been put in proper condition for use and habitation by the said lessor, or these presents shall thereby be determined and ended at the election of the said lessor or his legal representatives."

The plaintiff testified that the rent paid by him under the lease was all the rent paid by him for all the premises occupied by him. There was no evidence of any agreement of the owner of the land, either with the plaintiff or with any former tenant of the premises, as to the right of removal of the greenhouses, or of any rights therein, except as above set forth in the lease.

The plaintiff was entitled to recover according to his interest in the greenhouses, and it makes no difference whether or not he was the owner of them. All three requests were too broad, as they made no distinction between the greenhouses conveyed by the bill of sale and those which the plaintiff held under the lease. If we assume that the plaintiff could not recover for the greenhouses occupied by him under the bill of sale, still he was obliged to keep the greenhouses held under the lease "in first-class condition." The lessee also covenanted to deliver up the premises at the end of the term in as good order and condition as the same were in at the beginning of the lease, with certain exceptions. This gave him the right to recover for a permanent injury done by a third person, *Anthony* v. *New York, Providence, & Boston Railroad*, 162 Mass. 60, 65, unless the exceptions in the lease change the rule of law.

The defendant contends that the injury falls within the exception "fire and other unavoidable casualties"; that therefore the

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lessee was not bound to repair; and that he cannot recover in this action. But this argument does not make the request any the less too broad. The plaintiff could recover, as we have said, for his interest in the buildings. The liability of the defendant does not depend upon the contract between the lessor and lessee. 162 Mass. 63.

As no exception was taken to any part of the charge, we have no occasion to consider whether the rulings given were correct or not.

Exceptions overruled.

C. F. Baker & W. P. Hall, for the defendant.

C. E. Tupper, for the plaintiff.

HOSHOR-PLATT COMPANY *vs.* WILLIAM L. MILLER & others.

Suffolk. December 8, 1905. — January 20, 1906.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Equity Pleading and Practice, Master's report. *Equity Jurisdiction*, To reach and apply equitable assets.

Exceptions to a master's report relating only to matters of fact cannot be considered unless the evidence is reported.

In a suit in equity under R. L. c. 159, § 3, cl. 7, to reach and apply equitable assets, if the alleged debtor in his answer sets up the defence that the other defendants have not in their hands any assets or securities in which the alleged debtor has an equitable interest that cannot be attached at law, and insists on this defence before a master, offering evidence to show that there is no such equitable interest to be reached, the exclusion of this evidence by the master is erroneous.

In a suit in equity under R. L. c. 159, § 3, cl. 7, to reach and apply equitable assets, if the alleged debtor sets up in his answer that the other defendants have not in their hands assets in which he has an equitable interest and offers evidence to prove this averment which is excluded, and if the plaintiff introduces no evidence on the subject, the defendant is entitled to a decree.

SHELDON, J. This is a bill in equity brought under R. L. c. 159, § 3, cl. 7, to establish an indebtedness of $3,849.90, claimed to be due from the defendant Miller to the plaintiff; and to reach and apply in payment thereof certain securities and assets alleged to be in the hands of the other defendants. Miller in his answer denies that he is indebted to the plaintiff as

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alleged by it, sets up payment and a settlement with the defendant and a claim of recoupment, and denies that he has assets or securities in the hands of the other defendants which could not be reached at law. It does not appear whether process has been served upon the other defendants, or that they have filed any answers; but the bill has not been taken for confessed and no proceedings have been had against them. The bill was referred by the Superior Court to a master, and his report finds that the items of the plaintiff's demand were established, that a settlement claimed to have been made by Miller with one Flinn acting as an agent for the plaintiff is not binding upon it, but that Miller is entitled to certain credits and allowances, and that there is due to the plaintiff from him a balance of $1,449.90, beside interest thereon. The master also reported that during the progress of the hearing Miller, for the purpose of showing that the court had no jurisdiction in equity over the case, proposed to offer evidence that at the time the bill was brought he did not have any securities in the possession of the American Surety Company, one of the defendants, but that the master, by direction of the Superior Court, declined to take the evidence.

The defendant Miller alleged nineteen exceptions to the master's report, the last of which was to this refusal of the master. The Superior Court by an interlocutory decree overruled these exceptions and confirmed the master's report, and afterwards entered a final decree, which, without dealing with any of the other defendants, again overruled all exceptions, confirmed the master's report, ordered Miller to pay to the plaintiff the sum found due by the master, with interest and costs, and ordered execution to issue therefor. From the final decree Miller has appealed to this court.

Many of Miller's exceptions deal simply with matters of fact and cannot be considered because the evidence taken by the master has not been reported and is not before us. *Haskell* v. *Merrill*, 179 Mass. 120. Nor do we think that any of his other exceptions need be considered until we come to the nineteenth or last of them.

The cause of action relied on by the plaintiff is not in itself a subject of equitable jurisdiction; and the plaintiff's right to come into equity depends entirely upon the fact that the bill is

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brought to reach and apply in payment of its debt property of its debtor which cannot be reached to be attached or taken on execution in an action at law. R. L. c. 159, § 3, cl. 7. Accordingly the averments of the existence of such property are jurisdictional. *Russell* v. *Milton*, 133 Mass. 180. They must be proved as they are laid. If the averments of the bill do not sufficiently show the existence of such property, the bill may be dismissed on demurrer. *Pettibone* v. *Toledo, Cincinnati, & St. Louis Railroad*, 148 Mass. 411. *Emery* v. *Bidwell*, 140 Mass. 271, 275. *Phœnix Ins. Co.* v. *Abbott*, 127 Mass. 558. If on hearing it does not appear that there is such property, the bill must be dismissed. *Bennett* v. *Sweet*, 171 Mass. 600. *Tuck* v. *Manning*, 150 Mass. 211. The objection may indeed be waived, either by filing a bond to pay the amount of any indebtedness that may be established and thus dissolving the equitable attachment, as was done in *Woodbury* v. *Sparrell Print*, 187 Mass. 426, 431, or in any other way in which a defendant may waive the objection that a plaintiff in equity has a plain, adequate and complete remedy at law. But here this ground of defence was set up in Miller's answer; he never waived it, but endeavored to support it by offering evidence before the master; the plaintiff, having once made the jurisdictional averments, does not appear to have offered any proof of them or to have sought in any way to proceed against the other defendants; and the final decree is in effect merely an ordinary judgment at law.

We are of opinion that the decree appealed from must be reversed.

So ordered.

H. Lougee & J. G. Robinson, for the defendant Miller.

H. L. Baker & M. Freiman, for the plaintiff.

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JAMES D. SULLIVAN *vs.* NEW BEDFORD GAS AND EDISON LIGHT COMPANY.

Bristol. October 23, 1905. — February 26, 1906.

Present: KNOWLTON, C. J., LATHROP, LORING, BRALEY, & SHELDON, JJ.

Negligence, Liability to servant of independent contractor.

R. L. c. 106, § 76, is intended to preserve but not to enlarge the common law liability of the owner of machinery to a servant of a contractor employed by the owner for an injury caused by a defect in the machinery due to the owner's negligence or to that of some person entrusted by him with the duty of keeping it in proper condition.

The owner of machinery, who employs a contractor to do certain work by means of the machinery, is not liable for an injury to an employee of the contractor caused by an obvious imperfection in the machinery if it is not out of repair.

In an action by a coal shoveller for injuries from a lump of coal falling on him while employed by a stevedore in trimming coal in the hold of a barge at the defendant's wharf where the coal from the barge was being unloaded by an automatic device which tipped over a tub at the end of the arm of a derrick and after emptying the coal swung the tub back right side up to the hold of the vessel for another load, it appeared that the plaintiff was hired by the stevedore on the day of the accident and that he was injured the first time that the tub swung back after he went to work. There was evidence warranting a finding that the automatic apparatus was not balanced properly and for this reason the tub did not always come back latched and with its mouth up after discharging its load, and that this defect was the cause or a contributing cause of the falling of the lump of coal on the plaintiff, but there was no evidence that there was anything out of repair or that the apparatus was not in its usual condition. *Held*, that the plaintiff could not recover, the defendant having been under no duty to him to remove the obvious imperfections of the apparatus which it invited him to use.

TORT by a coal shoveller for personal injuries incurred on May 17, 1904, while employed by one Mahoney, a stevedore, in trimming coal in the hold of a barge at the defendant's wharf at New Bedford, with counts at common law and under the employers' liability act alleging unsuitable appliances and a defect in the ways, works and machinery of the defendant. Writ dated July 12, 1904.

At the trial in the Superior Court before *De Courcy*, J. the defendant at the close of the evidence asked the judge to rule that the plaintiff could not recover upon either count of his

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declaration. The judge so ruled and ordered a verdict for the defendant. The plaintiff alleged exceptions.

The following statement of the case is taken from the opinion of the court:

The bill of exceptions in this case does not give an intelligible explanation in all respects of the machinery here in question.

The plaintiff was employed by one Mahoney to work in unloading a cargo of coal from a barge alongside of the defendant's wharf in New Bedford. It appeared that the usual method of unloading coal cargoes is to fill a tub, then hoist it on a derrick or some apparatus in the nature of a derrick, and swing it in by a rope in the hands of a guy man until it is over the coal pocket where it is to be discharged, when another man called a dumper upsets the tub. The tub is then pulled back by the guy man until over the hatch in the coal vessel, when it is lowered into the hold.

In the case at bar the tubs used by the defendant were heavy tubs of iron, thirty inches deep and thirty-six inches in width, with wheels in the bottom of them; the defendant in its brief says they had three. These wheels were boxed in and apparently were used to wheel the tubs from place to place. Just when it became necessary to wheel them about in connection with the defendant's automatic apparatus hereinafter described, if at all, does not appear. On the back of the tub was a latch which was automatically knocked out when the tub was over the coal pocket, whereupon the tub turned over bottom up and discharged its load of coal. The tub was fitted with a balance weight intended to cause it to right itself, and upon its doing so the latch would catch again, and hold it bottom down and mouth up. It was then run back until over the hold of the vessel, when it was lowered into the hold to receive a new load.

It is stated in the bill of exceptions that "The tub is operated by a cable passing over a movable truck which travels on two parallel tracks forming an inclined plane from the dumping place over the pocket down to a position over the hold of the barge." Just what this means we do not know.

The plaintiff was hired by Mahoney on the day of the accident to take the place of a coal shoveller who had been taken with cramps. He was told by Mahoney to go into the hold of

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the barge, where he was set to work with Mahoney, shovelling a place for the tub on its return trip. The plaintiff's account of the accident was "that Mahoney told him to pair off with him, Mahoney; that he took a shovel and scraped the coal away just making room for the tub to come down, and he heard some one holler 'Look out,' and he jumped, and as he did so something struck him and rendered him unconscious." It appeared that what hit him was a lump of coal which had got jammed between one of the wheel boxes and the side of the tub and had not fallen out when the tub was upset. One of the plaintiff's witnesses testified "that as Mahoney and the plaintiff were scraping up coal to make room for the tub, the tub came down the run unlatched, and when it came to the forward end of the trolley the jar of the tub shook the lump of coal out of the tub, and it came down and hit the plaintiff on the head; that the tub came down the run mouth down and unlatched."

It appeared from the plaintiff's cross-examination that he had worked as a coal shoveller for five different employers in New Bedford; that for one of them he had worked for seven or eight years, shovelling coal and doing other work on the coal wharf. At this place and at another of these places tubs with boxed in wheels were in use, and he admitted that there was room enough for a lump of coal to get caught in these other tubs, but he testified that he never had known of coal being wedged in there, that is, between the wheel box and the side of the tub. It was testified to by the plaintiff and others called by him that it is the duty of the dumper when the ordinary method of unloading coal is used, to give warning if there is danger. It also appeared that the defendant's automatic device had been in operation for only twelve or thirteen days, all told, before the plaintiff was hurt; that on the day the plaintiff was hurt "it did not work any different than it had worked every day before; that the tubs sometimes came down latched and sometimes unlatched, and that in this respect there had been no difference from the beginning of his use of the apparatus; that there was nothing broken or out of repair on the day of the accident."

The plaintiff called a witness who testified that he was "a boiler maker and had been engaged in the business eighteen years, and had had experience in the making and mending of

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coal tubs; that he had had experience in calculating the proportion of weight in the adjustment of tubs; that the ordinary tub is made so that after being dumped it swings back again and catches; that this is done by the counter balance on the back of the tub; that these tubs of the coal company are balanced the same as the ordinary tubs; that the proper position when empty would be bottom down and mouth up." He further testified that "assuming that an iron tub weighing about twelve hundred pounds, three feet square and three feet deep, such a tub as is used for dumping coal from a barge, and intended to operate in such a manner that when suspended it will empty and remain in an upright position, held by a catch suspended from the bail to the back of the tub [it] fails when empty to return to an upright position, and is not held by any force other than its own weight," he should attribute its failure to take its proper position to its "not being properly balanced," that is, to its "not having sufficient weight on the back of it to bring it back to its proper position."

By the uncontradicted testimony there was, as we have said, nothing broken or out of repair on the day of the accident. It also appeared that the defendant's automatic apparatus was the only one in New Bedford, and that the plaintiff never had worked on it.

Mahoney testified that he was a stevedore; that he was paid so much a ton for unloading the coal; that he hired, discharged, paid and had charge of the men engaged in unloading the coal.

The judge ruled that the plaintiff had not made out a case, to which he took the exception which is now before us.

J. P. Doran, for the plaintiff.

O. Prescott, Jr., for the defendant.

LORING, J. [After the foregoing statement of the case.] We agree with the defendant that, as matter of law, on the evidence, Mahoney was an independent contractor; *Linton* v. *Smith*, 8 Gray, 147; *Conners* v. *Hennessey*, 112 Mass. 96; *Morgan* v. *Smith*, 159 Mass. 570; *Reagan* v. *Casey*, 160 Mass. 374; *Dane* v. *Cochrane Chemical Co.* 164 Mass. 453; *Boomer* v. *Wilbur*, 176 Mass. 482; *Eldred* v. *Mackie*, 178 Mass. 1; *Dutton* v. *Amesbury National Bank*, 181 Mass. 154; and that the plaintiff was his employee and not an employee of the defendant.

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We agree with the plaintiff in his contention that where an owner makes a contract to have work done for him by an independent contractor, with his, the owner's, apparatus, the owner owes a duty to employees of the contractor. This is so at common law. *Mulchey* v. *Methodist Religious Society*, 125 Mass. 487, 489. *Hayes* v. *Philadelphia & Reading Coal & Iron Co.* 150 Mass. 457. See also *Curley* v. *Harris*, 11 Allen, 112; *Conlon* v. *Eastern Railroad*, 135 Mass. 195; *Perkins* v. *Furness*, 167 Mass. 403.

The effect of R. L. c. 106, § 76, is in our opinion to make certain that the intervening contract does not prevent the owner's owing a duty directly to the employee of the contractor. We do not think that it was intended "to enlarge the liability" of the owner (as was said in *Toomey* v. *Donovan*, 158 Mass. 232, 236). In that respect § 76 is like the first clause of § 71 of R. L. c. 106.

Further, we are of opinion that the duty of the owner to the employee of the contractor is the duty owed by an employer to his own employee in such a case. In case of permanent apparatus to be used by an employee, there is an invitation on the part of the owner to use the apparatus. But it is an invitation to use the apparatus then owned by the owner. That being the invitation, no duty grows out of that employment to buy a new and better machine, or, as it is usually said, the employee as matter of contract assumes all obvious risks incident to the use of the apparatus on which he is employed to work.

The same is true in case the work is to be done by an independent contractor. The invitation held out by the owner by making a contract for work to be done with his apparatus is to use that apparatus and not another apparatus. If an employee of the contractor accepts that invitation no duty grows out of that invitation and the acceptance of it to buy a new or better apparatus.

In the case at bar the evidence warranted a finding that the defendant's automatic apparatus was not properly balanced, and that for that reason it did not always discharge its load and come back latched and mouth up, and that this defect was the cause or a contributing cause of the injury here complained of. But there was no evidence that anything was out of repair.

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There was therefore no evidence that the defendant had failed in the performance of a duty owed by it to the plaintiff.

It may seem hard on the plaintiff in the case at bar to hold that he assumed the risk of this bucket's not working as it should have worked when he was employed in a hurry and was injured the first time the bucket returned after he went to work. Whether that would have made any difference if he had been employed by the defendant or if he had sued the contractor need not be considered. His rights against the defendant grow out of the invitation given the plaintiff by reason of the contract with the plaintiff's employer. By inviting the contractor's employee to use that apparatus the defendant came under no duty to perfect it in matters which were obvious. The invitation given by the defendant to the contractor's employees cannot be affected by the circumstances under which the employee was employed by the independent contractor. This distinguishes the case at bar from *Ferren* v. *Old Colony Railroad*, 143 Mass. 197, were it not otherwise distinguishable, as we think it is.

Exceptions overruled.

COMMONWEALTH *vs.* GEORGE DEWHIRST.

Essex. November 8, 1905. — February 26, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & BRALEY, JJ.

False Entries. Pleading, Criminal. Evidence, Admissions and confessions.

An indictment of the clerk of a corporation under R. L. c. 208, § 58, for making false entries in a book of the corporation with intent to defraud, is sufficient if it charges the commission of the crime in the language of that section, without alleging in language taken from § 59 of the same chapter that the defendant "had access or right of access" to the book in which the entries were made, that being no part of the offence described in the preceding section.

At the trial of a clerk of a corporation, who also was its general manager, on an indictment under R. L. c. 208, § 58, for making false entries in books of the corporation with intent to defraud, it having appeared that there was a deficiency in the cash of the corporation, which the defendant has testified was caused by paying dividends that had not been earned, the government may show, as evidence of an admission by silence on the part of the defendant, that the president of the corporation said in the defendant's hearing that the defendant had made wrong entries for the purpose of covering up the deficiency, and that the witness

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asked the president whether the counsel of the corporation was "fully informed" and the president replied "I don't think he is," and that the defendant who was present said nothing although he previously had taken part in the conversation.

At the trial of a clerk of a corporation, who also was its general manager, on an indictment under R. L. c. 208, § 58, for making false entries in books of the corporation with intent to defraud, it is right to refuse a request of the defendant to rule "that entries made for the purpose of making a showing at the end of the quarter to induce the declaring of dividends would not be entries with intent to defraud within the meaning of the statute," as such a dividend not earned would in itself be a fraud.

If accounts of a corporation are kept on the stubs of check books given to it by banks, false entries of deposits made on these stubs by a clerk of the corporation with intent to defraud are entries on books of the corporation within the meaning of R. L. c. 208, § 58.

INDICTMENT, with thirty-eight counts, found and returned in the Superior Court for the county of Essex in May, 1904, charging the defendant, a clerk and servant of the Arlington Co-operative Association, with making false entries in violation of R. L. c. 208, § 58.

At the trial in the Superior Court before *Stevens*, J. the defendant moved to quash the indictment "because said indictment does not completely and fully, substantially and formally set forth any offence known to the law, in that in none of said counts is it alleged that the defendant was charged with any duty in reference to the books of the corporation named in said indictment, or had access or right of access to said books." In several of the counts the indictment followed the language of the statute. The judge denied the motion, and the defendant excepted.

It appeared that the Arlington Co-operative Association was a corporation organized under R. L. c. 110, § 7, and carried on a retail business in groceries, wood and coal, dry goods and boots and shoes in Lawrence, having several branch stores situated in different parts of that city, that the business was a cash business, the profits of which were intended to be distributed to its shareholders in quarterly dividends, and that the defendant besides being the clerk of the corporation was also its general manager.

Witnesses called by the Commonwealth testified without objection to certain statements made by the defendant at a meeting of the directors on October 26, which are referred to in

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the opinion, to the effect that the shortage which appeared in the cash was caused by paying dividends that had not been earned, and that the dividends had been declared to save the honor of the association. The witnesses then were asked as to statements made by the president of the corporation at that meeting in the presence of the defendant, to which the defendant made no reply, although previously he had taken part in the conversation. The counsel for the defendant stated that, while he would make no objection to any statements made by the defendant, he objected to evidence of statements made by the president or any third party to which the defendant made no reply. The judge admitted the statements made in the presence of the defendant which are quoted in the opinion, and the defendant excepted.

The defendant asked the judge to rule:

1. That entries made for the purpose of making a showing at the end of the quarter to induce the declaring of dividends would not be entries with intent to defraud within the meaning of the statute.

2. That the check books issued by the New England Trust Company and the Merchants National Bank, on which were kept the memoranda of deposits and withdrawals from the banks, were not books of entry of the corporation within the meaning of the statute.

The judge refused to make these rulings and the defendant excepted. One count was *nol. prossed.* The jury returned a verdict of not guilty on nine counts, and of guilty on all the remaining counts. The defendant alleged exceptions.

J. P. Sweeney, for the defendant.

W. S. Peters, District Attorney, for the Commonwealth.

LORING, J. 1. The motion to quash was rightly overruled. The objection specifically assigned is that "in none of said counts is it alleged that the defendant was charged with any duty in reference to the books of the corporation named in said indictment, or had access or right of access to said books." This case comes within the general principle that it is enough if the crime be charged in the language of the act creating it. *Commonwealth* v. *Ashton*, 125 Mass. 384. *Commonwealth* v. *Prescott*, 151 Mass. 60. *Commonwealth* v. *Dill*, 160 Mass. 536.

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Commonwealth v. *Hodgkins*, 170 Mass. 197. *Commonwealth* v. *Danziger*, 176 Mass. 290. In ascertaining the crime created by R. L. c. 208, § 58, the section in question, § 59, is not to be read into it as the defendant has contended.

2. The exception to the admission of what was said by others in the defendant's hearing was not well taken. It was admitted on the ground that the defendant, by remaining silent, admitted that what was stated was true; as to which see *Commonwealth* v. *McCabe*, 163 Mass. 98; *Commonwealth* v. *Funai*, 146 Mass. 570; *Commonwealth* v. *Brailey*, 134 Mass. 527; *Commonwealth* v. *Brown*, 121 Mass. 69. The principle is admitted by the defendant, but what he complains of here is its application. The facts were as follows: Since its organization in 1884, the defendant was and had been the corporation clerk and general manager of a co-operative association organized under R. L. c. 110. Since its organization the association had declared quarterly dividends until October, 1903. At a meeting of the directors on October 26, 1903, it appeared that while the report of the defendant as general manager for the preceding quarter showed an apparent profit that would justify the payment of a dividend, there was not sufficient cash to pay it. An examination of the books of the corporation by experts showed a shortage of cash. The examination also disclosed entries in the handwriting of the defendant, some in pencil and some in ink, some on the stubs of the check books "issued" by two banks, and some on the journal of the corporation purporting to show deposits, at certain periods, of moneys in said banks which had not been actually made therein, and also of balances in said banks at certain periods which were incorrect, and these entries were the subject of the indictment. There was also evidence tending to show that these entries were made to force cash balances at the time of the quarterly dividends. After the Commonwealth had introduced in evidence without objection certain statements made by the defendant at the directors' meeting of October 26, to the effect that the shortage was caused by paying dividends that had not been earned, and that the dividends had been declared to save the "honor" of the association, a witness was allowed to testify, against the objection of the defendant, that later the president of the association said in the defendant's hearing that the de-

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fendant had "made wrong entries to cover the deficiency up, for the purpose of covering the deficiency up," and that the witness asked the president whether the counsel of the association, who had come to the meeting to give advice, was "fully informed"; and that the president said, "I don't think he is." It was to these statements made in the defendant's presence without being contradicted by him that the defendant took an exception. The evidence was admissible.

3. The first ruling asked for was properly refused. The defendant's argument in support of his exception to the refusal to give this ruling is that the assets belonged to the shareholders, and if the shareholders received dividends that they did not earn they had not thereby lost anything. The difficulty with the defendant's contention is that such a dividend is a fraud in itself. It is not true, as the defendant assumes in his contention, that the only effect of such a dividend must be to transfer to the pockets of the shareholders money which of necessity belonged either to the association or to them. If the association was made insolvent by these dividends, the money divided did not belong to the shareholders but to the creditors of the association. Even if it was solvent, these entries may have been made to induce sales of merchandise to the association on a credit to which it was not entitled, or the sale by shareholders of shares for more than their real value, or to induce the association to continue in business or to continue to employ the defendant, which it would not have done had the facts been known. Any one of these would be fraudulent. The ruling was rightly refused.

4. There is nothing in the defendant's argument that because the check books (on the stubs of which false entries of deposit were made) were "issued" by the banks they were not books of entry of the association within the meaning of R. L. c. 208, § 58. These check books became books of the association within the meaning of the act, by the accounts of the association being kept in them by the officers and clerks of the association. Whether the books were given to the association or bought by it was of no consequence.

Exceptions overruled.

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CHARLES E. WESTON *vs.* BOSTON AND MAINE RAILROAD.

Essex. November 9, 1905. — February 26, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & BRALEY, JJ.

Carrier. Damages. Railroad.

In an action against a railroad company for failure to deliver scenery and other theatrical property received from the plaintiff for transportation with full knowledge that they were to be used in exhibitions previously widely advertised at the place of destination and that the expenses of the owner in connection with the exhibitions were to be large, the plaintiff, on proof of negligent delay in delivery, can recover the amount of the ordinary gross earnings from the exhibitions which he was prevented from giving less the amount of the expenses from which his inability to use the property saved him.

TORT by the owner of a public amusement enterprise, called the Galatea Exhibit, for alleged negligent delay in forwarding from Winchendon to Milford scenery and other theatrical property used by the plaintiff in his show business. Writ dated August 16, 1902.

In the Superior Court the case was tried before *De Courcy*, J. The character of the evidence as to notice to the defendant of the purpose for which the property was to be used is described in the opinion. It was agreed by the parties that the money expended by the plaintiff in looking up his property amounted to $4, and the judge ordered the jury to return a verdict for the plaintiff in that sum. He ruled that the plaintiff could recover no more; and the plaintiff alleged exceptions.

J. C. Sanborn, for the plaintiff.

H. F. Hurlburt, for the defendant, submitted a brief.

LORING, J. This case presents in different forms but one question, namely: To what damages is the owner of a theatrical exhibit entitled in case of a negligent delay in the transportation of his scenery and other theatrical properties by a carrier who had full knowledge that they were to be used in an exhibition previously widely advertised at the place of destination, and that the owner was under an expense of $300 or $400 a week in that connection.

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The judge ruled that the plaintiff was limited to $4, "the actual money lost or expended in looking up his goods."

The first ground on which the defendant has undertaken to support this ruling is that the shipping receipt or the shipping receipt and the shipping order constitute a written contract between the parties by which and by which alone their rights are to be determined.

No authorities have been cited for this contention, and we conceive that none can be found to support it. We assume for the purposes of this decision that this shipping receipt, or at any rate the shipping order and this receipt taken together, constitute a written contract. But it is always competent to show knowledge by the contracting parties to a written contract of the circumstances on the basis of which it is made, for the purpose of showing what was within the contemplation of the parties in making it. Knowledge of the circumstances which form the basis on which the contract is made is competent on the question of what damages were in the contemplation of the parties to it, whether a party seeks to recover ordinary or special damages. That has been laid down in all the cases on the subject. See for example *Scott* v. *Boston & New Orleans Steamship Co.* 106 Mass. 468; *Harvey* v. *Connecticut & Passumpsic Rivers Railroad*, 124 Mass. 421; *Mather* v. *American Express Co.* 138 Mass. 55; *Lonergan* v. *Waldo*, 179 Mass. 135; *Hadley* v. *Baxendale*, 9 Exch. 341; *Horne* v. *Midland Railway*, L. R. 7 C. P. 583; *S. C.* L. R. 8 C. P. 131; *Simpson* v. *London & Northwestern Railway*, 1 Q. B. D. 274; *Grébert Borgnis* v. *Nugent*, 15 Q. B. D. 85.

The next ground on which the defendant has sought to support the ruling is on the authority of *Waite* v. *Gilbert*, 10 Cush. 177; *Harvey* v. *Connecticut & Passumpsic Rivers Railroad*, 124 Mass. 421; and *Swift River Co.* v. *Fitchburg Railroad*, 169 Mass. 326.

But the plaintiffs in those cases were confined to the damages to which the plaintiff was confined in the case at bar, for want of proof of the necessary notice, while in the case at bar proof of the necessary notice was plenary.

Where a plaintiff is deprived of the use of property valuable for use and the property is something that can be replaced, his

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damages are the expenses of hiring the property which he is forced to substitute for it.

But if the property is such that it cannot be replaced, the measure of damages is what such property is ordinarily worth for use. See *Fletcher* v. *Tayleur*, 17 C. B. 21, 28; *Cory* v. *Thames Ironworks & Shipbuilding Co.* L. R. 3 Q. B. 181; *Ex parte Cambrian Steam Packet Co.* L. R. 6 Eq. 396, 408; *S. C.* L. R. 4 Ch. 112, 117.

There are no cases in this Commonwealth very near to the one under discussion. Perhaps the nearest are the cases in which it is held in an action of trover that where the property converted has no market value but has a special value to the plaintiff, he can recover that value. *Stickney* v. *Allen*, 10 Gray, 352. *Green* v. *Boston & Lowell Railroad*, 128 Mass. 221. *Mather* v. *American Express Co.* 138 Mass. 55. See also in this connection *Wall* v. *Platt*, 169 Mass. 398, 406.

Where the article of the use of which the plaintiff has been wrongfully deprived cannot be replaced and the plaintiff recovers for being deprived of the use of what such property ordinarily earns, he recovers profits in one sense of the word but not in that sense of the word in which it is used when it is said that profits cannot be recovered because too remote. What is meant by that is that the plaintiff cannot recover for the loss of special profits, such as a particular bargain which he has lost. For a good statement of the distinction see *Masterton* v. *Mayor of Brooklyn*, 7 Hill, 61.

There are cases where contracts are made with reference to such special profits, and where such special profits can be recovered. Such profits were recovered in *Grébert Borgnis* v. *Nugent*, 15 Q. B. D. 85; and it was such special profits that were unsuccessfully sought for in *Waite* v. *Gilbert*, 10 Cush. 177; *Harvey* v. *Connecticut & Passumpsic Rivers Railroad*, 124 Mass. 421; *Swift River Co.* v. *Fitchburg Railroad*, 169 Mass. 326; *Hadley* v. *Baxendale*, 9 Exch. 341; and *Horne* v. *Midland Railway*, L. R. 7 C. P. 583; *S. C.* L. R. 8 C. P. 131. The difference between those cases and the case at bar is this: Delay in the delivery of scenery and the other properties of a travelling theatrical company ordinarily means no performance by the company. But delay in the transportation of the broken shaft of a mill, for

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example, as in *Hadley* v. *Baxendale*, does not ordinarily mean that the mill will stop.

We construe the statement of the plaintiff's counsel in the case at bar "that he claimed no loss of profits and no loss in the market value of the goods by reason of the delay in the delivery of the goods, but that he did claim loss in the rental value or the loss of the use of the property," to be a statement that he did not ask for loss of special profits but for loss of the ordinary earnings of the property here in question.

The case at bar is not a case of special profit or special damage, but a case of the ordinary damages consequent on a delay in the delivery of scenery and other properties of a travelling theatrical company. That a common carrier with notice is liable in such a case is plain from the decision made in *Simpson* v. *London & Northwestern Railway*, 1 Q. B. D. 274, as to delay in the delivery of samples to be exhibited at a cattle show.

The ordinary damages in case of a delay in the transportation of such property as we have in the case at bar are different from the ordinary damages in case of a delay in the transportation of ordinary merchandise, and for that reason carriers usually put such property in a different classification from that in which ordinary merchandise is put. The question however is the ordinary damage from a delay in the transportation of that kind of freight. To get those ordinary damages, notice that the freight to be transported is that kind of freight, and that it is to be used at its destination must be given to the carrier; and the damages recoverable are the ordinary earnings of the property in question. See *Cory* v. *Thames Iron Works & Shipbuilding Co.* and *Ex parte Cambrian Steam Packet Co.*, *ubi supra*.

The case at bar presents a further question not raised by the facts of the cases last cited. There was evidence here that the plaintiff told the defendant that he was "under a big expense, between three and four hundred dollars a week," in the use of the thing delayed in transportation. In such a case, since the owner has to pay the expenses or some of the expenses incident to using the property, he can recover not the ordinary net earnings but the ordinary gross earnings less such expenses, if any, as the deprivation of the use of the property saved him from.

The concession made by the plaintiff's counsel that he did not

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ask for special profits saves us from considering the suggestion thrown out in *Lonergan* v. *Waldo*, 179 Mass. 135, 139, that it may be that the fact that a carrier cannot refuse to carry goods offered to him for transportation prevents him from being held for special damages or special profits, as to which see Kelly, C. B. in *Horne* v. *Midland Railway*, L. R. 8 C. P. 131, 136, 137; Mayne, Damages, (7th ed.) 42.

The defendant raised a question as to whether an exception was properly taken to the refusal of the offer to prove the expense the plaintiff was under while waiting for the goods in question. But since in our opinion the case must go back for a new trial by reason of his other exceptions, it is not necessary to decide whether that exception was properly saved or not.

The plaintiff is entitled to a new trial on the question of damages.

So ordered.

MARY H. COTTER *vs.* BOSTON AND NORTHERN STREET RAILWAY COMPANY.

Essex. November 10, 1905. — February 26, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & BRALEY, JJ.

Judgment.

A judgment on the merits is a bar to an action between the same parties for the same cause of action not only on all the issues actually tried in the case but on all which might have been tried in it.

A judgment for the defendant in an action brought by a girl less than four years of age against a street railway company for injuries from being struck by an electric car of the defendant through the negligence of its servants and agents, rendered on the ground that the plaintiff and her parents were not in the exercise of due care, is a bar to a subsequent action between the same parties for the same injuries, in which the declaration alleges wilful negligence on the part of the defendant and wanton and reckless conduct on the part of its servants and agents which would make the defendant liable although the negligence of the plaintiff and of her parents might have contributed to her injuries.

TORT, by a girl three years and ten months of age when injured, for injuries from being struck by an electric car of the defendant on March 1, 1899. Writ dated January 22, 1902.

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The declaration contained three counts. The defendant demurred to the first and third counts. Its demurrer was overruled in the Superior Court by *Mason*, C. J. The defendant also filed a plea in bar to all the counts alleging that the plaintiff had brought a previous action against the defendant for the same cause of action in which judgment was entered for the defendant as appeared by the records of the Superior Court and the Supreme Judicial Court. The case was heard by *Sherman*, J.

It appeared by the records that the former action was brought on May 23, 1899, and was tried before *Maynard*, J., who ordered a verdict for the defendant. Exceptions alleged by the plaintiff were overruled by this court in a decision reported in 180 Mass. 145. The decision was on the ground that the plaintiff was not exercising the care of a prudent adult, and that there was no evidence of due care on the part of her parents.

In the new action the declaration alleged wilful negligence on the part of the defendant and wanton and reckless conduct on the part of its servants and agents which would make the defendant liable although the negligence of the plaintiff and of her parents might have contributed to her injuries.

The judge sustained the plea in bar and gave judgment for the defendant; and the plaintiff appealed.

W. A. Kelley, for the plaintiff.

D. E. Hall, for the defendant, was not called upon.

LORING, J. The former judgment was for the same cause of action as that now sued on. It was rendered on the merits and is a bar not only on all the issues actually tried, but on all which might have been tried in it. *Foye* v. *Patch*, 132 Mass. 105. *Bassett* v. *Connecticut River Railroad*, 150 Mass. 178. *Bradley* v. *Bradley*, 160 Mass. 258. *Watts* v. *Watts*, 160 Mass. 464, 465. *Harlow* v. *Bartlett*, 170 Mass. 584, 591. *Clare* v. *New York & New England Railroad*, 172 Mass. 211. *Butrick, petitioner*, 185 Mass. 107.

Judgment affirmed.

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JOHN J. JOYCE *vs.* EXETER, HAMPTON AND AMESBURY STREET RAILWAY COMPANY.

Essex. January 1, 1906. — February 26, 1906.

Present: KNOWLTON, C. J., MORTON, LATHROP, HAMMOND, & SHELDON, JJ.

Negligence. Street Railway.

A street railway company may be found to have been negligent in operating cars decorated in such a manner as to frighten horses, and to be liable for injuries thus caused.

Whether a street railway company could be found to be liable for injuries to a horse who ran away when frightened by the noisy singing, shouting and horn blowing of a party of excursionists in one of its cars, whose disorderly conduct it made no effort to suppress, *quære*.

In an action against a street railway company for injuries to the plaintiff's horse who ran away when frightened by electric cars of the defendant decorated with strips of white cotton cloth and bunting while carrying an excursion party, there was evidence, that the plaintiff's horse was gentle and not afraid of electric cars, that he was harnessed to a delivery wagon and was standing in front of the plaintiff's store secured by a rope to an ordinary twenty-eight pound weight, that the excursion cars followed a regular car at distances of from six hundred to a thousand feet apart, that the bunting with which the cars were decorated was flapping with the motion of the cars and was bulging in and out, that on the second excursion car one end of the bunting was loose and in motion, that the cars were running "pretty fast," that there was a great amount of noise made by the passengers on one of the excursion cars in singing, shouting and blowing horns, that on the approach of the second excursion car the horse turned, ran down the street and was injured, that before and when the horse ran away the plaintiff and his clerk were engaged in putting up orders, that their attention was attracted to the noise upon the excursion car, but that neither of them left his place in the store to do anything with reference to the horse before he started to run. *Held*, that there was evidence for the jury of due care on the part of the plaintiff and of negligence on the part of the defendant. *Whether* the defendant would have been liable if it had been found that the injuries were caused by disorderly conduct of its passengers which it made no effort to suppress was not considered.

SHELDON, J. The plaintiff seeks to recover from the defendant for injuries to his horse, alleged to have been caused by the manner in which the defendant operated its railway. The plaintiff occupied a store in Amesbury, and the defendant is a street railway company running cars every half hour between Haverhill and Hampton Beach, through Amesbury, in front of the plaintiff's store. At the time of the accident, a regular car and

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three other cars carrying an excursion of butchers and grocers from Nashua, New Hampshire, were passing over the defendant's track, bound for Hampton Beach. The three excursion cars were following the regular car at distances of from six hundred to a thousand feet apart, and were decorated with strips of white cotton cloth about a yard wide, with the words "Butchers' & Grocers' Association of Nashua" printed thereon, one of these strips being over the dashboard and others along the sides of each of the excursion cars. The plaintiff's horse, harnessed to an ordinary delivery wagon, was standing in the street in front of his store, between the defendant's tracks and the sidewalk, secured by a rope and an ordinary twenty-eight pound weight. There was a great amount of noise made by the passengers on one of the excursion cars, in singing, shouting and blowing horns. The horse became frightened and ran away, and was injured. It was not struck or in any way injured by contact with either of the defendant's cars; but the contention was that it became frightened by the cars, and that this, together with the rate of speed at which the cars were running, caused it to run away and injure itself. There was evidence that the horse was kind, gentle, and not afraid of electric cars.

A witness for the plaintiff testified that the cars were running "pretty fast." The plaintiff's clerk testified that upon the approach of the second excursion car the horse turned and ran down the street; that he started from the store after the horse, and saw the car moving; that one end of the bunting on it was loose and in motion; and that the car was "almost under control" as it passed the store, and ran by the store a distance of from ninety to a hundred feet. There was no ordinance in Amesbury at that time fixing the rate of speed of electric cars. Other witnesses testified that the cars were decorated with bunting, which was flapping with the motion of the cars and bulging in and out.

The plaintiff and his clerk were engaged in the store, putting up orders, before and when the horse ran. Their attention was attracted to the noise upon the excursion car, but neither of them left his place in the store to do anything with reference to the horse before it started to run.

The defendant offered testimony tending to show that the

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horse started to run upon the approach of the last of the three excursion cars, and turned and ran across the street in front of that car, and that the motorman applied his brakes and stopped the car before it reached the place where the horse had been standing.

Upon this evidence, the defendant asked the judge who presided at the trial in the Superior Court to rule that the plaintiff could not recover, and, after a verdict for the plaintiff, brings the case before us upon an exception to the refusal to give this ruling.

Manifestly the question of the plaintiff's due care was for the jury. His horse was a kind and gentle one, not afraid of electric cars. It was fastened by an ordinary weight, apparently sufficiently heavy. The plaintiff's case is a stronger one in this respect than that which was held by this court to present a question for the jury in *Southworth* v. *Old Colony & Newport Railway*, 105 Mass. 342.

There was evidence of negligence on the part of the defendant. It ran its cars through a public street, decorated in a manner which the jury might have found was likely to frighten horses, and did produce that result in this case. *Jones* v. *Housatonic Railroad*, 107 Mass. 261. *Judd* v. *Fargo*, 107 Mass. 264. In *Patnoude* v. *New York, New Haven, & Hartford Railroad*, 180 Mass. 119, the covered electric car which frightened the plaintiff's horse was not upon the public street, but in the defendant's own freight yard. It does not appear whether the noises of shouting, singing and blowing horns, made by the passengers on the defendant's car, caused or contributed to the fright of the plaintiff's horse. No question seems to have been made as to this and no ruling was asked for at the trial. We need not consider whether the defendant would have been under any liability for injuries caused by disorderly conduct of its passengers which it made no effort to suppress.

Exceptions overruled.

C. H. Poor & E. B. Fuller, for the defendant.

R. E. Burke & J. T. Choate, for the plaintiff.

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ATTORNEY GENERAL *vs.* FREDERICK W. HERRICK.

Essex. January 3, 1906. — February 26, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LATHROP, & SHELDON, JJ.

Great Pond. Island. Commonwealth.

By the Colony ordinance of 1641 or 1647 the General Court took away from towns to which no grants had been made all power to act further in reference to great ponds not appropriated to individuals, and appropriated the ponds to the use of the public.

An island in a great pond, insignificant in size, rocky and sterile, worthless for agriculture or grazing, which never has been appropriated to any other than a public use, belongs to the Commonwealth.

Whether there might be in a great pond an island of such size, shape and character that after the passage of the Colony ordinance of 1641 or 1647 the town in which it lay could appropriate it to the use of a private person, *quære*.

INFORMATION by the Attorney General, filed January 14, 1903, under R. L. c. 188, to recover Loon Island in Chebacco Pond in the town of Hamilton, alleged to have been unlawfully entered upon and held by the defendant.

In the Superior Court the case was referred to Alden P. White, Esquire, as auditor. Later the case came on for trial before *Lawton*, J. No evidence except the auditor's report was introduced. The judge found, that, if under the order of reference any finding of facts by him was necessary, the facts were as stated in the auditor's report, and ruled *pro forma* that on these facts judgment should be entered for the defendant. At the request of the parties he reported the case for determination by this court. If his ruling was right, judgment was to be entered for the defendant; if not, judgment was to be entered for the plaintiff or such entry was to be made as the law might require.

Upon the whole case the auditor found for the defendant, finding that the Commonwealth does not own Loon Island. His finding in regard to the size and character of the island is quoted in the opinion, where other material facts found by the auditor also are stated. It was found by him as an admitted fact that on or about February 20, 1901, the defendant entered upon Loon Island "for the purpose of acquiring title thereto by adverse possession," that he erected a camp house thereon, and that he

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ever since has been in possession of the island under a claim of right, assuming to own and control it.

R. G. Dodge, Assistant Attorney General, for the plaintiff.

U. G. Haskell, for the defendant.

N. Matthews & J. M. Hallowell, for the city of Medford, filed a brief by leave of court.

KNOWLTON, C. J. This is an information brought by the Attorney General under the R. L. c. 188, to recover an island in Chebacco Pond, in the town of Hamilton, recently entered upon and held by the defendant. The question is whether, as against an intruder, the Commonwealth has a title to this island in a great pond, no part of which has ever been granted or conveyed by the town in which it is situated, or by the Colony, the Province or the Commonwealth, unless it be held that recognition of the town by the Colony, before the adoption of the Body of Liberties of 1641–47, was a grant which finally transferred the legal title. In this colonial ordinance is this language: "Provided, that no town shall appropriate to any particular person or persons, any great pond, containing more than ten acres of land," etc. Also the following: "And for great ponds lying in common, though within the bounds of some town, it shall be free for any man to fish and fowl there, and may pass and repass on foot through any man's propriety for that end, so they trespass not upon any man's corn or meadow." Anc. Chart. 148, 149. All such property then unappropriated was thereby reserved for a public use.

The report of the auditor shows that Chebacco Pond has never been appropriated to any person or persons, but has been held in accordance with this ordinance. It also appears from the report that no grant was ever made by the Colony to any persons as proprietors, nor to the town, although there was a recognition of the town, with such rights as were ordinarily exercised by towns which had no formal incorporation nor any formal grant of land. There were numerous such towns in existence at the time of the adoption of this colonial ordinance, and there were many great ponds in them. While, so far as we know, there is no express decision in Massachusetts upon an issue arising between a town and the State, as to whether the legal title to great ponds is in the towns or in the State, there

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are many cases in which it has been said that the title is in the Commonwealth. Here are quotations from some of them: "The law of Massachusetts . . . has treated great ponds as of a character nearly resembling tide waters . . . the title in which and the lands under them was not the subject of private property, unless by special grant from the Legislature." *Paine* v. *Woods*, 108 Mass. 160, 169. "Great ponds are public property, the use of which for taking water or ice, as well as for fishing, fowling, bathing, boating, or skating, may be regulated or granted by the Legislature at its discretion. . . . The pond and the water therein belonged not to the petitioners, but to the public." *Fay* v. *Salem & Danvers Aqueduct*, 111 Mass. 27, 28. "By the law of Massachusetts, great ponds, not appropriated before the Colony Ordinance of 1647 to private persons, are public property, the right of reasonably using and enjoying which . . . is common to all." *Hittinger* v. *Eames*, 121 Mass. 539, 546. "No question is made that, under the laws of this Commonwealth, Spy Pond is a great pond. It is therefore public property," etc. *Gage* v. *Steinkrauss*, 131 Mass. 222. "The great ponds of the Commonwealth belong to the public, and, like the tide waters and navigable streams, are under the control and care of the Commonwealth." *Attorney General* v. *Jamaica Pond Aqueduct*, 133 Mass. 361, 364. "Under the ordinance, the State owns the great ponds as public property, held in trust for public uses." *Watuppa Reservoir Co.* v. *Fall River*, 147 Mass. 548, 557. "They [the colonists] reserved to the Colony the property in the ponds themselves, the better to regulate these and other kindred public rights for the common good." "The ordinance secures to the Commonwealth, in great ponds, the same kind of ownership in the water that an individual purchaser of the entire area of a small pond would get by a perfect deed, or by an original grant from the government without restrictions." Minority opinion in the last case, pages 564, 566. "The Commonwealth was the owner of the great pond before the taking." *Proprietors of Mills* v. *Commonwealth*, 164 Mass. 227, 229. In *Potter* v. *Howe*, 141 Mass. 357, 360, a great pond had been artificially lowered, so as to leave a strip of land uncovered between the original water line and the lower water line. The court said: "By the withdrawal of the water by the defendants, a strip of land, the title

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to which is in the State and the use in the public, is interposed between his land and the water of the pond." In *Auburn* v. *Union Water Power Co.* 90 Maine, 576, 584, the court said, "It is a settled rule of law in this State and Massachusetts that all great ponds, — that is, ponds containing more than ten acres, — are owned by the State. This is a rule of law peculiar to this State and Massachusetts. It is said to have been derived from the Colonial Ordinance of 1641–7." These quotations show the construction put upon the ordinance, in its application to existing conditions, where great ponds had not been previously appropriated to individuals. The statements in the opinions are general, applying to ponds in towns which were settled and recognized before the adoption of the ordinance, as well as to those settled later. In several of the cases it distinctly appears that the pond is in a town which was a part of a town existing prior to 1641. So far as we are aware, there is no case in which it has been decided that the title to a great pond is held by a city or town, and the only cases in which that is treated as possible or probable are those in which a prior grant from the Legislature was proved or assumed. *West Roxbury* v. *Stoddard*, 7 Allen, 158. *Attorney General* v. *Revere Copper Co.* 152 Mass. 444, 448. In the former case there was a colonial act which was relied on as a grant, and in the latter a grant was distinctly shown. In the latter case is this language: "It is held that the title to great ponds which had not previously been granted is in the Commonwealth for the benefit of the public, and, if a pond had previously been granted to a town, and had not passed to a private person, the legal title remains in the town, but the beneficial right is in the public." This is a distinct recognition of the difference between cases in which there had been an express grant to a town and those in which there had been no grant.

It may be well to consider what were the relations of towns to the local land when no grant was made, in the early years of the colony. They were undoubtedly authorized, expressly or by implication, to represent all public interests, to a large degree, in local matters, subject to the direction and control of the Colony. They were in possession of the land within their recognized boundaries, with authority to appropriate it to individual

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settlers, and to manage for the general good that which was left in common. But, until it was appropriated, they had no title which they could set up against the general rights of the Colony. In their distribution of land and in the management of that which remained public, they exercised authority which originally belonged to the Colony alone, and in the absence of a grant, they acted as representatives of the central power and ownership. In *Commonwealth* v. *Roxbury*, 9 Gray, 451, 500, Chief Justice Shaw said, "Even an act of incorporation, without an express grant of the lands within it, would not, in our judgment, effect a transfer of the public lands. Such an act, with limited bounds, would pass municipal jurisdiction, but not soil." So on page 501, "All the early acts fixing boundaries between towns . . . have no tendency to prove or disprove title; they affect the question of jurisdiction only, and for the purpose of the present inquiry may be laid out of the case." See *Litchfield* v. *Scituate*, 136 Mass. 39, 44. In *Porter* v. *Sullivan*, 7 Gray, 441, 443, 444, Chief Justice Shaw says, "All private property or ownership in land, within the limits of the Colony of Massachusetts, must be derived from a grant of the colonial government. . . . Of course, all the early records of the Colony are filled with acts prescribing the bounds of each township; but such acts, intended solely to fix the limits of jurisdiction, are never used as instruments for granting land." In *West Roxbury* v. *Stoddard*, 7 Allen, 158, 169, Mr. Justice Hoar said of a town holding lands, where the grant was not to individuals and where the evidence tended to show a grant to the town: "Its functions were then of a twofold nature: to distribute the lands among the freemen for the purposes of settlement, reserving such parts as might be deemed requisite for various public uses; and to do its part as a constituent member of the new state, bearing its proportion of the public burdens; clothed with limited powers of self-government in local matters; but amenable to the Commonwealth, and subject to its control and direction. There can be no doubt that from the earliest period the legislature of the Colony exercised the unquestioned authority of deciding what public duties should be discharged by the towns, including not only appropriations of money, but of lands. . . . The right to change the boundaries of towns, and to create new ones from the territory of towns

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already existing, was never questioned." In *Boston* v. *Richardson*, 13 Allen, 146, 150, Mr. Justice Gray uses this language: "On the 3d of March 1635–6 the general court enacted that the freemen of every town should 'have power to dispose of their own lands and woods, with all the privileges and appurtenances of the said towns, to grant lots, and make such orders as may concern the well ordering of their own towns, not repugnant to the laws and orders here established by the general court.' 1 Mass. Col. Rec. 172. It appears however by the records of the colony that the rights and powers of the towns in lands within their limits were considered as subordinate to the paramount power of the general court at its discretion to grant lands in any town, not already granted to individuals. 1 Mass. Col. Rec. 101, 102, 103, 111, 129, 130, 240." So in *Lynn* v. *Nahant*, 113 Mass. 433, 448, we find these words: "The lands within the limits of a town, which had not been granted by the government of the Colony either to the town or to individuals, were not held by the town as its absolute property, as a private person might hold them, but, by virtue of its establishment and existence as a municipal corporation, for public uses, with power by vote of the freemen of the town to divide them among its inhabitants, yet subject to the paramount authority of the General Court, which reserved and habitually exercised the power to grant at its discretion lands so held by the town."

When the colonial ordinance of 1641–47 was adopted, the General Court took away from the towns to which no grants had been made all power to act further in reference to great ponds not appropriated to individuals, and appropriated the ponds to the use of the general public. Under the enactment of the General Court quoted above from *Boston* v. *Richardson*, towns, in the absence of a grant, had nothing but a delegated authority which the General Court might at any time terminate. The general government was the natural owner and controller of property held for the public, and as the towns had no absolute title, on the adoption of the ordinance the original title of the Colony remained perfect, with no right in the towns any longer to interfere with it. This we conceive to be the ground on which the court has proceeded in reaching the conclusions quoted above.

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Our Legislature, in recent statutes, has recognized the rights of the Commonwealth in great ponds, not only as to the public use of them, but also as to the title. St. 1869, c. 384, § 9. Pub. Sts. c. 91, § 12. Pub. Sts. c. 196, § 11. R. L. c. 202, § 30. R. L. c. 96, §§ 15, 16, 18, 27. We are of opinion that the title to Chebacco Pond is in the Commonwealth.

The defendant contends that, even if the pond is owned by the State, Loon Island is not included in it. The auditor found "that Loon Island is insignificant in size, rocky and sterile; that previous to the defendant's occupation it has never been continuously used or occupied by anybody, and that it is worthless for agriculture or grazing. Fishermen and boating parties from picnic grounds on the shore and elsewhere have landed on the island when and as they pleased, without prohibition from any source, and doubtless gunners have built blinds thereon, behind which they have held tenure according to the patience of their kind." Whether all islands in great ponds are to be treated as parts of the ponds, under this ordinance, may be a question not free from doubt. Ordinarily a grant of a pond as a piece of real estate would include the entire area within its borders. Islands in rivers, within the boundaries where the line extends to the thread of the stream, are included within grants. *Lunt* v. *Holland*, 14 Mass. 149. *Ingraham* v. *Wilkinson*, 4 Pick. 268. *Deerfield* v. *Arms*, 17 Pick. 41. *Hopkins Academy* v. *Dickinson*, 9 Cush. 544. *Nichols* v. *Suncook Manuf. Co.* 34 N. H. 345. *Kimball* v. *Schoff*, 40 N. H. 190. See *People* v. *Warner*, 116 Mich. 228, and *Canal Commissioners* v. *People*, 5 Wend. 423, in which latter case Chancellor Walworth says that "Our local law appears to have assigned . . . the beds of the lakes with the islands therein to the public." In an official answer to an inquiry by the board of harbor and land commissioners, Attorney General Knowlton gave an opinion that the islands in great ponds are the property of the Commonwealth. Attorney General's Report for 1901, pages 55, 56.

While there are grounds for an argument that the ordinance of 1641–47 had reference only to the waters of the great ponds and the land under them, there is much force in the suggestion that the expressions "great pond, containing more than ten acres of land," and "great ponds lying in common, though within the

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bounds of some town," refer to great ponds as physical features of the country, including any islands within them.

But in the present case we need not decide this question, for it is plain that this island is not one that would naturally be separated in ownership from the land under the water and from the water itself. There is nothing in it which ever would have called for an appropriation of it to any other than a public use, and it never has been so appropriated. The title to it has been treated by the town and by everybody as going with the title to the rest of the pond. Without finding it necessary to determine whether there might be an island of such size and shape and character that the town might lawfully appropriate it to a private person after the passage of the ordinance of 1641–47, we are of opinion that the title to this island has never been separated from the title to the pond, and that it belongs to the Commonwealth.

Judgment for the plaintiff.

ENFIELD MANUFACTURING COMPANY *vs.* ARTHUR J. N. WARD.

Hampshire. January 15, 1906. — February 26, 1906.

Present: KNOWLTON, C. J., MORTON, LATHROP, HAMMOND, & SHELDON, JJ.

Railroad. Abandonment.

If a railroad company acquires by a warranty deed the fee of land included in its location, begins work on the location and grades a part of the roadbed across the land, and afterwards abandons the location for railroad purposes and establishes another location elsewhere, this does not divest the railroad company of its title to the land.

Whether the owner of the fee of land can lose his title by abandonment for any length of time short of the period of limitation, *quære*.

MORTON, J. This is an action of trespass *quare clausum*, and the matter in dispute relates to the title of the locus. The plaintiff claims title through one Lebo who entered and took possession of the premises in July, 1903, and a few days after executed a warranty deed of them to the plaintiff. One Caswell

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afterwards surveyed them for the plaintiff and put in pins. The defendant claims title, through his predecessors, from the Minot Manufacturing Company which formerly owned the premises, and in 1878 conveyed them by warranty deed to the Massachusetts Central Railroad Company. The railroad company began work upon its location, and a part of the road-bed across the locus was graded. This work ceased in 1874, and the locus never was used for railroad purposes. The railroad was built over another location several miles distant. The plaintiff contends that the locus had been abandoned and that Lebo's entry gave him a seisin which his deed operated to convey to the plaintiff and under which the plaintiff itself also entered. At the close of the evidence the plaintiff asked the judge to rule that the locus had been abandoned. The defendant asked for a ruling that there was no evidence for the jury on the question of abandonment. The judge ordered a verdict for the defendant, and the case is here on the plaintiff's exceptions.

It does not appear on what ground the judge ordered the verdict for the defendant, but we think that the ruling was right. The abandonment of the location for railroad purposes by the railroad company and its successors did not divest it or them of the fee. The case would have stood very differently if the interest of the railroad company had been limited to a right of way acquired by the location of its road under the statute. In that case the fee would have remained in the landowner and an abandonment of the location would have operated as an extinguishment of the easement. But in this case the fee was in the railroad company, and still remained in it notwithstanding the abandonment of the location for railroad purposes by it and its successor, the Central Massachusetts Railroad Company, and passed under the deed of the latter to the Boston and Maine Railroad and from it, by deed of release and quitclaim, to the defendant. Whether there could be an abandonment by the owner of the fee that would operate to divest him of his title short of possession continued for such a length of time as to bar an action by him for the recovery of the premises we need not consider. We think that there was no evidence of such an abandonment in this case. Abandonment is, in part at least, a

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question of intention, and so far from there having been an intention on the part of the Massachusetts Central Railroad Company to adandon the locus, the vote of the directors passed in May, 1880, authorizing the president to take such action as he should deem expedient in regard to the disposition of land acquired by the company upon that part of the line which had been abandoned in the towns of Hardwick, Greenwich, Enfield (where the locus was) and Belchertown indicated directly the contrary. The fact that the trustees under the mortgage paid no taxes on the land and did not know of it and paid no attention to it had no tendency to prove an abandonment of it either on their part or that of the railroad company, even if we assume that an abandonment by the mortgagee could affect the title of the mortgagor. The question of *ultra vires* is not involved. The railroad company acquired the property rightfully, and there is nothing in the original act of incorporation (St. 1869, c. 260) or in St. 1880, c. 169, or the other amendatory acts, which rendered its continued ownership of the property unlawful after the location had been abandoned. Besides, it is doubtful, to say the least, whether if there were any question of *ultra vires* it could be raised by the plaintiff. There is nothing to show any interruption by the defendant of the plaintiff's right of way over the locus. And, as already observed, the action relates to the title and not to the right of way.

Exceptions overruled.

O. E. Dunham & H. M. Coney, for the plaintiff.

J. C. Hammond & J. H. Schoonmaker, for the defendant.

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WILLIAM W. CRAPO & another, trustees, *vs.* CHARLES R. PRICE, executor, & others.

Bristol. October 24, 1905. — February 27, 1906.

Present: KNOWLTON, C. J., MORTON, LATHROP, HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Devise and Legacy, Construction.

A testatrix bequeathed to trustees a sum of money in trust, directing them to invest it and pay to K. the income therefrom during her life, "and after her decease to pay, distribute and divide the said principal fund, however the same may be then invested, to and among the children of said K. and the issue of any deceased child by right of representation." *Held*, that the gift in remainder was to those persons who at the time of the death of K. were her children and the issue of any deceased child by right of representation, and that a child of K. who, surviving the testatrix, died in the lifetime of K. leaving no issue had no interest which would pass to his or her legal representative.

BILL IN EQUITY, filed in the Probate Court for the county of Bristol on September 23, 1904, by the trustees under the will of Sylvia Ann Howland, late of New Bedford, for instructions.

The clause of the will to be interpreted is quoted in full in the first paragraph of the opinion.

The Probate Court made a decree "that the estate given by the sixth section of the will of Sylvia Ann Howland belongs only to those children of Keziah Price who were living at the decease of said Keziah Price, and Charles R. Price as executor of Abbie C. Bassett is not entitled to a share thereof." Charles R. Price, executor, appealed.

The case was heard by *Barker*, J., who ordered that the decree of the Probate Court be affirmed, and that the case be remanded to the Probate Court for further proceedings. Charles R. Price, executor, appealed.

The case was argued at the bar in October, 1905, before *Knowlton*, C. J., *Lathrop*, *Loring*, *Braley*, & *Sheldon*, JJ., and afterwards was submitted on briefs to all the justices.

O. S. Cook, (*A. E. Perry* & *M. R. Brownell* with him,) for Charles R. Price, executor.

J. B. Sullivan, Jr., (*P. R. Blackmur* with him,) for Thomas and Orville Bassett.

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SHELDON, J. The sixth clause of the will of Sylvia Ann Howland reads as follows: "I give and bequeath to the said Edward D. Mandell, George Howland, Jr., and William A. Gordon, trustees above named, the further sum of ten thousand dollars in trust; and I direct them to invest the same in their own name, and to pay to Keziah Price, daughter of the late Charles Russell, the income and net profits therefrom during her life, and after her decease to pay, distribute and divide the said principal fund, however the same may be then invested, to and among the children of said Keziah and the issue of any deceased child by right of representation, such issue taking the share which would have belonged to their deceased parent." Keziah Price was a close friend of the testatrix, but does not appear to have been in any way related to her. She and her four children survived the testatrix; but one of these children, Abbie C. Bassett, died before the death of her mother, Mrs. Price, leaving no issue. Mrs. Price has now died; and the petitioners, the present trustees under the will of Sylvia Ann Howland, have brought this bill to obtain instructions as to how the trust fund given by this clause is to be distributed.

The only question in dispute is whether Abbie C. Bassett had a vested interest in the remainder, which passed to the executor of her will, or whether her interest was contingent upon her surviving her mother; whether, that is, the limitation over after the death of Mrs. Price was to her children, with a provision that if any of those children should die during the continuance of the life estate leaving issue, the share of the one so dying should go to such issue, or whether it was to her children and the issue of any deceased child taken collectively. In other words, the question is whether the gift to the issue by right of representation of any deceased child of Mrs. Price is a substitutional or an original gift.

Certain general rules have been adopted for the construction of wills; and it is important that such rules, especially so far as they have become rules of property or have declared principles of substantive law, should not be lightly departed from. For example, a will is generally to be regarded as speaking from the time of the testator's death, and rights of devisees or legatees are to be taken to vest at that time, and estates given by will

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are to be treated as vesting immediately upon the death of the testator, unless there is clearly manifested an intention to make them contingent upon a future event. *Bosworth* v. *Stockbridge*, 189 Mass. 266. So, too, it is a general rule that under a bequest to A. for life, with remainder to his children, each one of these children who is alive at the death of the testator takes then a vested interest in the remainder; and this is none the less a vested interest that in order to carry out the manifest intention of the testator, the class will open to let in after born children, if there shall be any, up to the time appointed for the final distribution, although the shares of the children living at the death of the testator will thus be diminished in amount; so that the result will be that all children who are alive after the death of the testator take a share which they can dispose of, unless there is some provision for its being divested. *Ball* v. *Holland*, 189 Mass. 369. It is not necessary to multiply citations for the support of any of these propositions. Nor will the general rule of construction be altered though the gift over to the children of the tenant for life be accompanied by a provision that if any of the class thus constituted dies during the continuance of the life estate leaving issue, then the share of any one so dying is to go to his issue by right of representation; for it is now settled by our decisions that in such a case the shares of the children would be vested on the death of the testator, though subject to be divested upon the contingency of their subsequent death leaving issue. *Blanchard* v. *Blanchard*, 1 Allen, 223. *Weston* v. *Weston*, 125 Mass. 268. *Dodd* v. *Winship*, 144 Mass. 461. *Lenz* v. *Prescott*, 144 Mass. 505, 514, 515. *Webster* v. *Ellsworth*, 147 Mass. 602, 604. If accordingly we had here a limitation to children with the provision that the share of children dying with issue should go to such issue, there would be no difficulty in saying that the shares of the children became vested at the death of the testatrix, and so that the share of Abbie C. Bassett must now be paid to the executor of her will.

But, as was said by Hammond, J., in *McCurdy* v. *McCallum*, 186 Mass. 464, 468, "While in the earlier cases there was a disposition to formulate general rules and to give to a particular word or phrase the same meaning in one will as in another, sometimes even at the risk of defeating the real intention of

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the testator, the later cases, in trying to ascertain the true meaning of a word or clause, are inclined to give more consideration to the language of the whole will, and to the particular circumstances of each case. In England, as here, the cardinal rule in the interpretation of wills, to which all other rules must bend, is that the intention of the testator shall prevail, provided that it is consistent with the rules of law." We think that this correctly states the present condition of our law. It is not that there are no longer any rules of construction to be observed; it is rather that these rules are to be followed so far as they aid in determining the meaning of the testator, but when that meaning is ascertained it is to be adopted; that the intention of the testator is to be gathered from the will as a whole, and when ascertained is to determine the construction which the court will put upon his language. *Weston* v. *Weston*, 125 Mass. 268, 270. So in *Heard* v. *Read*, 169 Mass. 216, 223, Field, C. J., said: "The present tendency in this country is against absolute rules of construction, and in favor of a careful consideration of the particular language of each will, as well as of its general scope and purpose, in order to determine, in view of the circumstances known to the testator when the will was made, his intention as expressed in it." The same doctrine was repeated by this court in considering another part of the will here in question. *Crapo* v. *Pierce*, 187 Mass. 141. It often has been affirmed by this court in dealing with questions as to vested or contingent remainders, and in deciding whether beneficiaries were to be determined as of the date of the testator's decease or as of a subsequent period of distribution provided for by the will. *Shattuck* v. *Stedman*, 2 Pick. 468, 469. *Olney* v. *Hull*, 21 Pick. 311, 313. *Sears* v. *Russell*, 8 Gray, 86, 94. *Denny* v. *Kettell*, 135 Mass. 138, 139, 140. *Peck* v. *Carlton*, 154 Mass. 231. Accordingly the question in this case is, taking the language of the testatrix and using all the assistance that can be derived from the general rules of construction, not to override her meaning but to assist in discovering it: What was her real intention in making the provision contained in this clause of her will?

It must be remembered that this limitation is not made to children of the testatrix or to her relatives by blood or marriage; and no help can be derived from the cases which have laid down

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the rule that a remainder given to the testator's children is to be regarded as vested, even though the court might otherwise have treated it as contingent. Great weight was given to this consideration in *Gibbens* v. *Gibbens*, 140 Mass. 102, in which C. Allen, J., said, p. 104: "We are of opinion, on the whole, that the case falls within the general rule, that a vested remainder will be held to have been intended, in the case of a devise to the testator's children, unless there is something sufficient to show the contrary." To the same effect see *Stanwood* v. *Stanwood*, 179 Mass. 223, and *Bancroft* v. *Fitch*, 164 Mass. 401. We do not of course mean that this circumstance is of any affirmative weight to show that the remainder in question is contingent, but simply to say that there is an absence of one consideration which if present would have tended strongly to indicate that a vested remainder was created.

The difficulty in the case arises, however, from the language employed by the testatrix. The gift over is made by a direction to the trustees of the fund; and that direction is that after the decease of Keziah Price they are "to pay, distribute and divide the said principal fund, however the same may be then invested, to and among the children of the said Keziah and the issue of any deceased child by right of representation, such issue taking the share which would have belonged to their deceased parent." That is, if we follow the literal language of the will, the beneficiaries, the persons among whom the fund is finally to be divided, are her children and the issue of any deceased child; and then follows a provision that the amount to be taken by such issue is to be the amount which would have belonged to their deceased parent. By directing the final payment and division to be made among beneficiaries thus to be ascertained, the testatrix, according to the natural import of her words, has excluded those children who should die during the life estate without leaving issue. Plainly, some of these beneficiaries, the issue of deceased children, cannot be determined until the decease of the life tenant; and this affords a strong indication that all of the beneficiaries are to be then determined. It is only after the decease of Keziah Price that the trustees are directed to make the final payment and distribution; the thing to be divided is the trust fund as then existing, "however the

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same may be then invested"; the payment and distribution are to be made "to and among the children of the said Keziah and the issue of any deceased child by right of representation." The fact that, as here, some of the legatees in remainder could not be ascertained until after the termination of the life estate, has been regarded as having a strong tendency to show that all the remaindermen must be ascertained at that time, and so that all the remainders were contingent. *Smith* v. *Rice*, 130 Mass. 441. *Denny* v. *Kettell*, 135 Mass. 138. *Harding* v. *Harding*, 174 Mass. 268.

Moreover it seems to us that the testatrix intended the whole fund to be divided among the beneficiaries whom she identifies by description, that is, among the persons who at the time of division answer to the description which she gives, who are then either children or the issue of deceased children of Mrs. Price. The children and issue of deceased children, though standing in different degrees of relationship to their ancestor, are described as forming one collective body, one class, as in *Bigelow* v. *Clap*, 166 Mass. 88; *Hill* v. *Bowers*, 120 Mass. 135; *Bassett* v. *Granger*, 100 Mass. 348; *Young's appeal*, 83 Penn. St. 59. Nor do we see how, without putting an undue strain upon the language of the testatrix, it can be said that the remainder after the life estate is not as much a direct gift to the issue of deceased children as it is to the children themselves; but if the children living at the death of the testatrix took then vested remainders, subject only to be divested in the case of those who should happen to die during the continuance of the life estate, leaving issue, the provision for the issue of deceased children must be treated as purely substitutional.

Another consideration is that there are in this limitation, as already noticed, no words of present gift to the children of the life tenant. The trustees are directed to pay to Keziah Price the income during her life, and after her decease to pay and divide the principal fund to and among her children and the issue of any deceased child. The employment of such language often has been held to indicate that the testator intended that the title should not vest until the period of distribution should arrive, that the bequest should be contingent until that time. *Eager* v. *Whitney*, 163 Mass. 463. *Hale* v. *Hobson*, 167 Mass. 397. *Peck*

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v. *Carlton*, 154 Mass. 231. *Denny* v. *Kettell*, 135 Mass. 138. And although this may not be an absolute and decisive rule of construction, it generally has been regarded as of importance and as a weighty consideration in arriving at the meaning of a testator. See the cases collected in 30 Am. & Eng. Encyc. of Law, (2d ed.) 771. *Hale* v. *Hobson*, *ubi supra*, has indeed been somewhat limited by *Codman* v. *Brigham*, 187 Mass. 309; but we are not aware that its declaration of the principle here stated ever has been impugned.

By the true construction of this will, in view of all the circumstances, it is the opinion of a majority of the court that the parties entitled to take this gift in remainder are those who at the time of the death of Keziah Price were her children and the issue of any deceased child by right of representation, and that a child of hers who died in her lifetime leaving no issue, had no vested interest which would pass to the executor of his or her will.

Accordingly the decree appealed from must be affirmed.

So ordered.

MARY E. GIFFORD *vs.* INHABITANTS OF WESTPORT & others.

Bristol. October 25, 1905. — February 27, 1906.

Present: KNOWLTON, C. J., LATHROP, LORING, BRALEY, & SHELDON, JJ.

Landing Place. Limitations, Statute of. Nuisance.

Under Rev. Sts. c. 24, § 61, Gen. Sts. c. 46, § 1, Pub. Sts. c. 54, § 1, R. L. c. 53, § 1, no right to maintain a private building on a public landing place the boundaries of which can be made certain can be acquired by a possession of less than forty years. Here in the case of a boat house it was held that the evidence justified a finding that for many years before the limit of time had run there had been a substantial abandonment of the use to which the building formerly had been put, and that there was nothing to prevent the removal of the boat house as a nuisance.

LATHROP, J. This is a bill in equity, filed in the Superior Court on February 27, 1905, by the widow and devisee of Jonathan Gifford, against the town of Westport and the board of landing commissioners of that town, appointed under the St. of

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1848, c. 171,* to restrain the defendants by injunction from removing from the public landing place in the town a small boat house, alleged to have been used for the housing of boats, and the storage of fishing tackle, sails, oars and warps, for more than forty years.

On the bill being filed a temporary injunction was issued, and the case was afterwards heard by a judge of the Superior Court, who ordered a decree to be entered dismissing the bill, with costs. He also filed a memorandum of his decision, stating the reasons therefor; and the case is before us on an appeal from the decree. The record contains a full report of the evidence.

A boat house was built in 1857, by Jonathan Gifford and Edward Akin, on the landing place in question. In 1867 Akin sold out his share to Gifford, who died in 1896, leaving his property to his widow, the plaintiff. In 1900 a new boat house was built on substantially the same place as the old one, by the plaintiff's son; and in 1905 the landing place commissioners of Westport moved the new building to another part of the beach. The son moved it back to its former location; and this bill in equity was brought.

There can be no doubt that the placing of the old boat house on a public landing was an intrusion at common law, and made the building a nuisance. *Commonwealth* v. *King*, 13 Met. 115. *Morton* v. *Moore*, 15 Gray, 573. *Commonwealth* v. *Blaisdell*, 107 Mass. 234. *New Salem* v. *Eagle Mill Co.* 138 Mass. 8.

If the plaintiff is entitled to recover it must be that under the statute there had been acquired a possession for forty years. The judge ruled that this possession must be adverse, and under a claim of right, and found that there was no such possession. The statute in force when the first boat house was built was § 61 of the Rev. Sts. c. 24, which provides that when the boundaries of a landing place, among other public places mentioned, can be made certain, (as here) "no length of time, less than forty years, shall justify the continuance of a fence or building, on any . . . landing place." This statute, in substantially the same form, has come down to the present time. Gen. Sts. c. 46, § 1. Pub. Sts. c. 54, § 1. R. L. c. 58, § 1.

* An act for the regulation of public and town landings in the town of Westport.

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In *Cutter* v. *Cambridge*, 6 Allen, 20, 24, it was said by Mr. Justice Hoar, in construing the Rev. Sts. c. 24, § 61: "The language of the statute, though negative in form, was intended to be affirmative in substance; and to recognize as an existing rule of law, that fences, maintained under a claim of right for forty years within the limits of the highway, give to the owner an absolute right to continue them there as against the public." See also *Parker* v. *Framingham*, 8 Met. 260, 268; *New Salem* v. *Eagle Mill Co.* 138 Mass. 8.

There is nothing in the evidence in the case at bar to show that the original boat house was put up under a claim of right, or that it was maintained adversely. But if this were otherwise the judge further found that the plaintiff's devisor made no use of the building during a period of about eight years preceding his death; "and that during that time, as admitted at the hearing, he was mentally incapacitated to act or to have a purpose to act or assert; that during that period, and for some years before, the building had been neglected, suffered to fall into decay and substantial ruin; that in the year 1897, when it was contended that the limit of time had run, there was and had been for many years a substantial abandonment of the use to which the building had formerly been put."

An examination of the evidence satisfies us that the judge was right in the conclusions which he reached. To review the evidence at length would serve no useful purpose. We concur in the finding of the judge that the plaintiff is not entitled to the relief sought.

Bill dismissed, with costs.

F. M. Sparrow, for the plaintiff.

E. D. Stetson, for the defendants.

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DAVID WASSERMAN *vs.* MICHAEL McDONNELL.

Bristol. October 26, 1905. — February 27, 1906.

Present: KNOWLTON, C. J., LATHROP, LORING, BRALEY, & SHELDON, JJ.

Sales of Merchandise in Bulk. Mortgage of Chattels.

St. 1903, c. 415, in regard to sales of merchandise in bulk, has no application to a chattel mortgage of a stock in trade given in good faith for a valuable consideration and duly recorded.

A chattel mortgage of a stock in trade, declared to apply to all future acquired stock which the mortgagor shall have in his business, given in good faith for a valuable consideration, operates as an executory agreement which subjects after acquired goods to the lien of the mortgage if the mortgagee takes possession of the goods before the rights of third persons intervene. The existence of the claim of a creditor without attachment or seizure on execution is not such an intervention.

If by the terms of a chattel mortgage five days' notice in writing of a foreclosure sale is required, and it appears that a notice either of four or five days was given, although the mortgagor may have had the right to set aside the sale for insufficient notice, yet if he has assented to the sale and treated the notice as good, the irregularity does not affect the title of a *bona fide* purchaser at the sale as against a creditor of the mortgagor.

In the foreclosure of a chattel mortgage under a power of sale contained in the mortgage it is not necessary that a notice of the foreclosure and an affidavit of the service thereof should be recorded.

LATHROP, J. This is an action of tort against a constable for the conversion of certain goods alleged to belong to the plaintiff. In the Superior Court the case was sent to an auditor, under an agreement of the parties that the findings of fact by the auditor should be final. The auditor found for the plaintiff in the sum of $38.26, with interest from August 4, 1904. On motion of the plaintiff, a judge of the Superior Court ordered judgment for the plaintiff, and the case is before us on the defendant's appeal.

It appears from the auditor's report that on February 5, 1904, one Holshanetzky owned a stock of dry goods in a shop in New Bedford, and on that day executed and delivered to one Stern a chattel mortgage of the stock, which was duly recorded. The auditor found that the mortgage was given for the consideration therein named, and was not in fraud of creditors at common law.

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After giving the mortgage, the mortgagor remained in possession of the goods, as he had a right to do under a clause in the mortgage reading as follows: "I am to sell in my usual course of business the stock in trade covered by this mortgage, and this mortgage shall apply to all future acquired stock that I shall have in my business." The possession of the mortgagor continued until four or five days before July 12, 1904, when the mortgagee through his attorney gave written notice of foreclosure to the mortgagor and took possession of the property for a breach of the conditions of the mortgage.

On July 12, the mortgagee sold the mortgaged property in one lump by public auction. The auctioneer put out a red flag the usual time before the sale, and the fact of the sale was known beforehand in the neighborhood. There was no written advertisement of the sale. There were ten or twelve persons at the sale and the auctioneer cried out the goods in the usual manner. The plaintiff made the highest bid of $875, and the goods were knocked down to him. There were other bids, among them bids of $700 and $800. The mortgagor was present at the sale and a consenting party to all proceedings. The plaintiff paid for the stock and took immediate possession thereof, and remained in undisturbed possession until the taking by the defendant on August 4, 1904.

At the time of the sale there were two creditors of the mortgagor other than the mortgagee. One was the landlord of the shop, to whom $10 was due for rent, and the other was Laura Lambert, who, on July 8, 1904, had obtained a judgment against Holshanetzky for $15 and costs. On August 4, 1904, the defendant seized a portion of the goods on an execution issued in the above named suit of Lambert *v.* Holshanetzky. The defendant removed the goods, and they did not again come into possession of the plaintiff.

The auditor found that the sale was conducted properly and in good faith, and that the plaintiff was a *bona fide* purchaser for value without notice of any irregularity.

1. The first contention of the defendant is that the St. of 1903, c. 415, applies to a mortgage, and the foreclosure thereof. The act is entitled "An Act to prohibit sales of merchandise in bulk in fraud of creditors." We are of opinion, however,

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that this act has no application to the case at bar. The object of the statute was to protect creditors against fraudulent sales. Here no fraud was shown. The mortgage was on six months' time, and was given for a valuable consideration. It does not appear that when it was given the mortgagor had any creditors except the mortgagee. The mortgage was duly recorded.

2. The next contention is based upon the first report of the auditor, in which he stated that he found that additions were made to the stock of goods after the date of the mortgage; and that he was left in doubt whether such added stock was sold at the foreclosure sale. When the case was recommitted to the auditor, he found on this point as follows: "Between the date of the mortgage and July 12 the mortgagee added about fifty dollars worth of goods to his stock. I do not find that any such after acquired property was sold at the auction." The mortgage in question contained this clause: "This mortgage shall apply to all future acquired stock that I shall have in my business." The defendant contends that the burden of proof was upon the plaintiff to show that no after acquired goods were sold at the auction, and that the auditor's report does not show this. There is no occasion to consider these questions. The law in Massachusetts is now well settled. While property acquired after a mortgage is delivered does not pass to the mortgagee as against attaching creditors and subsequent vendees and mortgagees, yet a provision in a mortgage that it shall cover after acquired goods operates as an executory agreement that such goods shall be holden by the mortgagee as security, when acquired by the mortgagor; and the mortgagee may take possession before the rights of third persons intervene. The mere fact that a person is a creditor is not enough. He must have a claim upon the goods before the mortgagee takes possession, either by attachment or by a seizure upon an execution. *Rowley* v. *Rice*, 11 Met. 333. *Blanchard* v. *Cooke*, 144 Mass. 207, 223. *Bennett* v. *Bailey*, 150 Mass. 257, 260. *Bliss* v. *Crosier*, 159 Mass. 498. In the case at bar the only justification which the defendant sets up is the seizure of the goods on execution nearly a month after the sale.

3. The next contention of the defendant is that the foreclosure is invalid because no proper notice was given. By the terms

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of the mortgage five days' notice in writing of the time and place of sale were required. The auditor has found that either four or five days' notice was given. If a mortgagor sought to set aside a sale on the ground of insufficient notice, he would prevail; but we see no ground for holding in a case like the present, where the mortgagor assents and treats the notice as good, that the sale is not valid. Besides, the plaintiff was a purchaser for value and was not affected by an irregularity in the execution of the power of sale. *Stevenson* v. *Hano*, 148 Mass. 616. *Silva* v. *Turner*, 166 Mass. 407, 413. The case of *Rogers* v. *Barnes*, 169 Mass. 179, decided merely that a mortgagor could maintain an action of tort against a mortgagee for the wrongful execution of a power of sale, when there had been no breach of any condition of the mortgage, although the land had been sold to a *bona fide* purchaser for value.

4. The last contention of the defendant is that the foreclosure is void because the notice of the foreclosure, with an affidavit of the service thereof, was not recorded. It appears in the original report of the auditor that there was no evidence concerning the record of the notice. In the supplemental report, nothing is said on the subject. We doubt whether any such question is open to the defendant; but if it is open, and the notice was not recorded, it does not follow that the foreclosure was void.

The statute upon which the defendant relies is the R. L. c. 198, § 6; but this section, together with §§ 4, 5 and 7, relates to the redemption of mortgages, and points out one method of foreclosure. They have nothing to do with a foreclosure under a power of sale, except that § 4 provides: "The mortgagor or a person lawfully claiming under him may, after breach of condition, redeem the mortgaged property at any time before it is sold in pursuance of the contract between the parties, or before the right of redemption is foreclosed." The remaining sections point out how a mortgagee may foreclose. They have no relation to a foreclosure under a power of sale contained in a mortgage.

Judgment for the plaintiff affirmed.

A. Auger, for the defendant.

F. Wasserman, for the plaintiff.

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ELIZABETH A. JORDAN *vs.* OLD COLONY STREET RAILWAY COMPANY.

CORNELIUS JORDAN *vs.* SAME.

Bristol. October 26, 1905. — February 27, 1906.

Present: KNOWLTON, C. J., LATHROP, LORING, BRALEY, & SHELDON, JJ.

Negligence. Street Railway.

In an action against a street railway company by a passenger injured in jumping from a car of the defendant standing on a turnout when it was about to be run into by another car of the defendant which had entered the turnout, it was admitted that the plaintiff was in the exercise of due care, and, on the issue of the negligence of the motorman of the moving car, it appeared that shortly before the accident the switch was set right and was changed by a mischievous boy, that the motormen had been warned by the superintendent of the defendant to have their cars under control when approaching a switch, and the motorman of the moving car testified that it was his practice "when approaching the switch to slow down pretty well and steady his car; that on this occasion he did not notice that the switch was open until he was within twenty feet of it." He admitted that the collision of the two cars took place eighty or ninety feet after he passed the switch, the motorman of the other car putting it at eighty or a hundred feet. The motorman of the waiting car saw the approaching car fifteen hundred feet away while the motorman of the moving car did not appear to have seen the car on the turnout until he passed the switch. There was contradictory evidence on the question whether the rails on the turnout were slippery. *Held*, that there was evidence of negligence on the part of the motorman of the moving car to submit to the jury.

LATHROP, J. These are two actions of tort. The first is brought by a minor, by her next friend, for personal injuries sustained by her while a passenger on the defendant's road. The second action is brought by the father of the plaintiff in the first case to recover for the loss of her services. At the close of all the evidence the defendant asked the judge to rule that the plaintiffs could not recover. The judge refused so to rule; the jury returned a verdict for the plaintiff in each case; and the cases are before us on the defendant's exception to the refusal to rule as requested. We shall consider only the first case, as no question is made as to the right of the plaintiff in the second case to recover if the verdict is sustained in the first case.

The accident happened about nine o'clock in the evening of August 7, 1903. The defendant had a single track electric road,

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with turnouts, between Taunton and Fall River, a distance of seventeen miles. The car on which the plaintiff was a passenger was on a turnout waiting for a car to pass coming from Taunton on the main line, when the car coming from Taunton entered upon the turnout and caused the collision. The plaintiff was injured by jumping from the car; but it was admitted that she was in the exercise of due care; and the only question in the case is whether the motorman of the car coming on to the turnout was negligent in not having his car under control when approaching the turnout, it being also admitted that the switch was set right shortly before the accident, and that it was changed by a mischievous boy. The judge also ruled that the plaintiff could not recover on the count charging negligence in regard to the switch.

We are of opinion that there was evidence for the jury upon the question of negligence in the management of the south bound car. The motorman of the car testified that it was his practice "when approaching the switch to slow down pretty well and steady his car; that on this occasion he did not notice that the switch was open until he was within twenty feet of it"; and he does not pretend that he did anything until then. He admits that the collision took place eighty or ninety feet from the north end of the switch; while the motorman of the other car puts the point of collision at eighty or a hundred feet. There was also evidence that motormen had been warned by the superintendent of the defendant company to have their cars under control when approaching a switch. In addition to this the motorman of the car on the turnout testified that he saw the south bound car fifteen hundred feet away, while the motorman of the other car does not appear to have seen the car on the turnout until he had passed the switch. The evidence was contradictory on the question whether the rails on the turnout were slippery or not.

On all the evidence we are of opinion that the ruling asked for was rightly refused; and that the case was properly submitted to the jury.

Exceptions overruled.

F. S. Hall & C. C. Hagerty, for the defendant.

J. B. Tracy, for the plaintiffs.

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JOSEPH SMITH *vs.* CITY OF LOWELL.

Middlesex. November 14, 1905. — February 27, 1906.

Present: KNOWLTON, C. J., MORTON, LATHROP, HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Municipal Corporations. Lowell.

In an action by the clerk of the board of police of the city of Lowell against that city to recover a balance of $300 alleged to be due him as salary, it appeared that under the revised charter of that city, St. 1896, c. 415, the board of police, having power to appoint a clerk of the board and to fix his salary, appointed the plaintiff to that office and fixed his salary at $1,800 per year, that the city council, having control of appropriations, voted that "the joint committee on appropriations shall determine, in their annual appropriations, the amount to be allowed for clerical assistance," and in an appropriation of $4,700 for salaries of the police board and the clerk of the police board provided only $1,500 for the plaintiff's salary for the year. Section 8 of the revised charter provides that "no sum appropriated for a specific purpose shall be expended for any other purpose; and no expenditure shall be made and no liability be incurred by or on behalf of the city until the city council has duly voted an appropriation sufficient to meet such expenditure or liability, together with all prior unpaid liabilities which are payable therefrom," with an exception not material. In addition to the appropriation above named the city council appropriated $127,806 for salaries and labor of the police department, which subsequently was increased by $225, and there were receipts from services of officers, creating a surplus of $1,470 in the appropriation after paying for all labor and salaries, exclusive of the balance claimed by the plaintiff. *Held*, that, the plaintiff's salary being one of the salaries of the police department, the surplus of the appropriation properly was applicable to its payment, and that the attempt in the appropriation to restrict the plaintiff's salary to $1,500 was of no effect, being beyond the power of the city council.

CONTRACT for a balance of $300 alleged to be due the plaintiff for services as clerk of the board of police of the defendant during the year 1902. Writ dated July 23, 1903.

In the Superior Court the case was submitted to *Stevens*, J. upon an agreed statement of facts permitting the court to draw inferences of fact, as stated in the opinion. The judge found for the plaintiff, and assessed damages in the sum of $337.50, including interest from December 31, 1902. The defendant appealed.

The case was submitted on briefs at the sitting of the court in November, 1905, and afterwards was submitted on briefs to all the justices.

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J. G. Hill, for the defendant.

N. D. Pratt & J. J. Devine, for the plaintiff.

KNOWLTON, C. J. This is an action to recover a balance of salary, claimed by the plaintiff as clerk of the board of police of the city of Lowell. The case was submitted on an agreed statement of facts, which permitted the court to draw such inferences from the facts as might properly be drawn by a jury. The Superior Court found for the plaintiff, and from the judgment on the finding the defendant appealed to this court. On such an appeal, the only question of law open is whether there was any evidence in the agreed facts which would warrant the finding for the plaintiff. *Davis* v. *Harrington*, 160 Mass. 278. *Norton* v. *Brookline*, 181 Mass. 360.

The salary of the plaintiff was fixed by the board of police on December 31, 1901, at $1,800 per annum, and he has not been fully paid at that rate. Under the St. 1895, c. 187, creating this board, the board has power, by the provisions of § 7, to appoint a clerk, and impliedly to fix his salary, which, by the terms of the statute, cannot be less than $500 per annum. The St. 1896, c. 415, is "An Act to amend the charter of the city of Lowell," and by § 5 of this chapter "The heads of the several departments and offices shall have the power to appoint and employ and to discharge all subordinate officers and employees in their respective departments." "The appointment or employment of such an officer includes the fixing of his compensation, whether designated as salary or wages, as well as the choice and naming of the appointee." *Faulkner* v. *Sisson*, 183 Mass. 524, 526. The board of police has always fixed the salary of the clerk of the board since the office was created, and there is no question that the vote to give the plaintiff a salary of $1,800 per year was binding upon the city, unless its validity is affected by certain action of the city council in regard to appropriations.

Under the St. 1896, c. 415, § 7, and other sections, the city council is prohibited from directly or indirectly taking "part in the employment of labor, the purchase of material, the construction, alteration or repair of any public works or other property, or in the care, custody or management of the same, or in general in the expenditure of public money or in the conduct of the executive or administrative business of the city," with certain

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exceptions immaterial to this case. By § 6 the heads of the several departments are given general charge and management of all matters pertaining to their respective departments, except the purchase of materials and supplies. Except under the St. 1895, c. 187, § 6, which deals with the number of patrolmen and the pay of police officers, the city council has nothing directly to do with the management of the police department, or with the expenditure of money in promoting its objects. As was pointed out in *Muldoon* v. *Lowell*, 178 Mass. 134, 138, the act amending the city charter made very important changes in the method of management of municipal affairs in the city of Lowell, increasing largely the responsibilities of the executive department; but the city council is left in control of the appropriations, and, under § 8 of this act, except in the expenditure for schools, it may block the wheels of municipal action by withholding or limiting appropriations. The language referred to is as follows: "No sum appropriated for a specific purpose shall be expended for any other purpose; and no expenditure shall be made and no liability shall be incurred by or on behalf of the city until the city council has duly voted an appropriation sufficient to meet such expenditure or liability, together with all prior unpaid liabilities which are payable therefrom, except that after the expiration of the financial year and before the making of the regular annual appropriations liabilities payable out of the regular appropriation may be incurred to an amount not exceeding one sixth of the total of the appropriation made for similar purposes in the preceding year."

The vote of the city council that "the joint committee on appropriations shall determine, in their annual appropriations, the amount to be allowed for clerical assistance" had no effect to fix the salary of the plaintiff, for the city council had no jurisdiction to determine his salary. Its only effect was upon the amount of the appropriation. The appropriation "of $4,700 for salaries of police board and clerk of police board," which was subsequently made, provided only $1,500 for the plaintiff's salary for the year, and if there were no appropriation out of which his salary could lawfully be paid, the city would not be liable for any more than this sum. But the city council also appropriated "$127,806 for salaries and labor of police de-

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partment." This was subsequently increased by an additional appropriation of $225, and there were receipts from other departments for services of officers, such that there was a balance of $1,470.38 in the appropriation, after paying for all labor and salaries, except the balance of $300 claimed by the plaintiff. The plaintiff's salary was one of the salaries of the police department, and this appropriation was properly applicable to the payment of his salary, as well as any other salary of the department. There was no insufficiency of appropriations that could lawfully be used in paying his salary, as it was fixed by the board of police, and it does not appear that the liability to him was improperly incurred under § 8. Payment of this salary does not require that a "sum appropriated for a specific purpose shall be expended for any other purpose." The language of the appropriation should not be restricted to accomplish a purpose of the city council in regard to a matter which was outside of its province. The details of management and expenditure in the police department were entrusted to the board of police, subject only to the limitation contained in St. 1895, c. 187, § 6, and it was irregular for the city council to attempt to dictate in regard to salaries to be paid to particular subordinates. If improper payments were made, the remedy provided by the statute is of another kind.

While the statute recognizes the right of the city council to make specific appropriations, it does not contemplate that, in these appropriations, it shall attempt to interfere with the management of the department, to the extent of stating the sums to be paid as wages or salaries to particular clerks or employees. Without attempting to determine what subdivisions are permissible in making specific appropriations, we are of opinion that the appropriation for "salaries and labor of police department" could lawfully be used to make up a deficiency in the appropriation specially intended for the salary of the clerk of the board. For another case in which this statute has been considered, see *Stratton* v. *Lowell*, 181 Mass. 511.

Judgment for the plaintiff.

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LAURENCE MINOT, trustee, *vs.* GEORGE PURRINGTON, JR., administrator, & others.

Norfolk. December 4, 5, 1905. — February 27, 1906.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Devise and Legacy, Construction. *Judgment. Probate Court. Equity Jurisdiction*, Bill for instructions. *Trust. Executor and Administrator.*

A will contained the following provision: "I direct my said trustees to pay in like manner, one quarter part of the nett income of said residue and remainder to the children of my deceased son H. during their natural lives, to be paid to them severally, half yearly, or oftener if convenient to my trustees, on their personal receipts, or their guardians and in case any of said H.'s children decease without issue, the share of such deceased child to go to the survivors, and upon the decease of my said son H.'s children I direct that one quarter part of the residue and remainder of my estate be distributed among his grandchildren, such grandchildren representing their parents and receiving their shares as they respectively attain the age of twenty one years and in the mean time to receive the income of their respective shares." *Held*, that the interests of the grandchildren of H. vested on the death of the testator, subject to being lessened by the opening of the remainder to let in after born grandchildren, and that the interests thus vested in the grandchildren included their vested interests in the contingent remainders which would accrue to them on the death of any of H.'s children without issue.

On a bill by a trustee under a will for instructions as to the distribution of a fund in his hands, it appeared that the fund accrued under a provision of the will upon the happening of a certain contingent event, and that many years before on the happening of a like contingent event a distribution under the same clause of the will had been made under a decree of the Probate Court, which omitted from the distribution certain persons entitled to share in it, that at the hearing of the former bill for instructions on which the decree was made the persons omitted from the distribution were living in a foreign country and had no knowledge of the proceedings, but that before the decree was made general notice was given by publication in accordance with law and the rules of the court, and also that the executor of the will under which the excluded persons claimed received notice of the petition and joined in a request that the distribution should be made as ordered by the decree. *Held*, that the former decree of the Probate Court was conclusive upon the parties in regard to the fund distributed under it, and that the payments made under it could not be interfered with, but that the decree had no effect upon the rights of the parties to funds accruing after it was made, and that subsequent payments, distributed erroneously through a misunderstanding by the parties of their rights, should be adjusted in making the present distribution, (all parties interested being before the court, there being no laches, and all claims for income being waived,) by deducting the overpayments and giving the amount of them to the persons wrongly omitted.

In the distribution of a fund held by a trustee under a will, if it appears that one

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of the persons whose estate is entitled to share in the distribution, who was the owner of a vested remainder and of a vested interest in contingent remainders, died, at the age of two years, more than forty-seven years before the distribution, leaving his father as his only heir at law and next of kin, and that an administrator of the estate of the infant then was appointed and since has died, it is not necessary that an administrator *de bonis non* of the infant's estate should be appointed, and the payment of his share may be made directly to the administrator *de bonis non* with the will annexed of his father.

BILL IN EQUITY, filed in the Probate Court for the county of Norfolk on April 30, 1908, by the trustee under the will of William Taylor, formerly of Roxbury, for instructions.

On appeal from a decree of the Probate Court the case came on to be heard before *Hammond*, J., who reserved it upon the bill and answers and an agreed statement of facts for determination by this court. The material facts appear in the opinion.

F. Brewster, for the trustee.

M. R. Hitch, (*F. M. Sparrow* with him,) for the administrator with the will annexed of Ansel Weeks, Jr., and for the widow and children of Ansel Weeks, Jr.

W. H. Dunbar, for Anne Ashton Warren and others.

KNOWLTON, C. J. The will of William Taylor, late of Roxbury, who died in 1858, contains a provision as follows: "And I direct my said trustees to pay in like manner, one quarter part of the nett income of said residue and remainder to the children of my deceased son Henry Taylor during their natural lives, to be paid to them severally, half yearly, or oftener if convenient to my trustees, on their personal receipts, or their guardians and in case any of said Henry's children decease without issue, the share of such deceased child to go to the survivors, and upon the decease of my said son Henry's children I direct that one quarter part of the residue and remainder of my estate be distributed among his grandchildren, such grandchildren representing their parents and receiving their shares as they respectively attain the age of twenty-one years and in the mean time to receive the income of their respective shares."

Referring to this provision, the court said in *Minot* v. *Taylor*, 129 Mass. 160, 162, the testator gives "a life estate to the children of his deceased son Henry with a like limitation over to their issue." Considering it more particularly, the children of Henry severally receive estates for life, with remainder over to

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his grandchildren taking by right of representation, with a further provision that the shares of the children who die without issue shall go to the survivors and be distributed like their original shares among the grandchildren.

The first question in the case is whether the interests of the grandchildren vested on the death of the testator, or at some later time. We see nothing to take the case out of the general rule that such estates are to be deemed vested on the death of the testator, unless it plainly appears that he intended them to be contingent upon a future event. *Bosworth* v. *Stockbridge*, 189 Mass. 266, and cases cited. *Ball* v. *Holland*, 189 Mass. 369. Our reports are full of cases in which remainders created by similar language have been held to be vested immediately after the death of the testator, although the time for possession is postponed. *Shaw* v. *Eckley*, 169 Mass. 119. *Hills* v. *Simonds*, 125 Mass. 536. *Dole* v. *Keyes*, 143 Mass. 237. *Marsh* v. *Hoyt*, 161 Mass. 459. *Abbott* v. *Bradstreet*, 3 Allen, 587. *Bowditch* v. *Andrew*, 8 Allen, 339. The words import a present gift to the grandchildren. The shares are referred to as "their shares" and "their respective shares." The time of receiving their shares is when they respectively attain the age of twenty-one years, although in the meantime after the death of their parents they are to receive the income. This language as to the time of distribution should be considered as merely postponing the time of payment, and not the time of vesting. *Shattuck* v. *Stedman*, 2 Pick. 468. It is entirely consistent with an immediate vesting of the interest and a postponement of the possession. *Childs* v. *Russell*, 11 Met. 16. *Darling* v. *Blanchard*, 109 Mass. 176. So too is the provision that the grandchildren shall represent their parents in the distribution of the shares. *Gibbens* v. *Gibbens*, 140 Mass. 102. *Dodd* v. *Winship*, 144 Mass. 461.

It is equally clear, under our decisions, that in the case of such gifts to children or grandchildren the remainder will open to let in after born members of the class. *Ballard* v. *Ballard*, 18 Pick. 41. *Dorr* v. *Lovering*, 147 Mass. 530. *Hills* v. *Simonds*, 125 Mass. 536, 538. *Bosworth* v. *Stockbridge*, 189 Mass. 266. We are of opinion that in this part of the will the remainders over to the grandchildren vested on the death of the testator, as similar remainders vested at the same time under another provi-

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sion in the same clause of this will. *Minot* v. *Doggett*, *post*, 435. Treating the accretions to the shares which come from the death of two of the children of Henry Taylor without issue as contingent remainders, the grandchildren acquired, on the death of the testator, vested interests in these contingent remainders, which ultimately have the same effect as their vested remainders in their respective shares. *Winslow* v. *Goodwin*, 7 Met. 363. *Cummings* v. *Stearns*, 161 Mass. 506.

If nothing more appeared, we should have no hesitation in ordering a distribution of the fund in equal shares, one for the legal representatives of each of the four children of Henry Taylor second who died leaving issue.

Intervening proceedings have raised further questions. Two children of Henry Taylor have died leaving no issue, and their shares go to the survivors, to be divided ultimately among the grandchildren of Henry Taylor. The first of these was Abigail W. Austin who died in 1857, and her share was rightly treated as a part of the fund to be held for the others. Lydia B. Taylor died November 27, 1902, and the trustee has in his hands $9,740.66 which he was holding for her at the time of her decease, and which constitutes the fund now to be distributed.

Eliza J. Weeks, one of the children of Henry Taylor, was the wife of Ansel Weeks, Jr., and had a son born on May 30, 1856, named Charles Warren Weeks. She died on December 25, 1857, and her son Charles W. Weeks died on May 30, 1858, leaving his father Ansel Weeks, Jr. as his only heir at law. Ansel Weeks, Jr. married Clelia Lega on May 10, 1862, and by her had two children, Ethel, born on January 10, 1864, and Oceana, born on December 20, 1865. He died on June 18, 1873, leaving these two children and their mother surviving him, and they, as well as George Purrington, Jr., administrator *de bonis non* with the will annexed of Ansel Weeks, Jr., are before the court as claimants in this case.

Under the will as we have construed it, Charles W. Weeks took a vested interest in the fund from which his mother had been receiving income, and on his death his interest passed to his father Ansel Weeks, Jr. as his distributee, under whose will it passes to the widow and children, the above mentioned claimants. The trustees and other *cestuis que trust* have proceeded as

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if there were no outstanding interests in Ansel Weeks, Jr., or in any of his family. At first, for many years, they treated the fund as if no payment of principal should be made to any of the grandchildren of Henry Taylor until after the decease of all his children. No payment nor division of principal was made after the death of Eliza J. Weeks, which occurred a little later. But after the decease of Henry Taylor, one of the children of the testator's son Henry, which occurred in 1886, a distribution was made of one fourth of the fund, which was paid over to Henry W. Taylor and Helen B. Ames, the two children of this grandchild, Henry Taylor. This payment was made under the direction of the Probate Court, given upon a bill for instructions filed by the trustees. Instead of including only one fifth of the entire fund as it should have done, it included one fourth of it, on the theory that the share of which Eliza J. Weeks received the income passed to her surviving brothers and sisters, and not to her son. The question arises whether this distribution and payment can be set aside in this proceeding. The decree authorizing and directing it was made by the Probate Court which appointed the trustees and had jurisdiction of the fund. It was made after general notice given by publication in accordance with law and the rules of the court. To make a valid decree for the management and distribution of the trust fund it was not necessary that the court should obtain jurisdiction of every person interested in it by making personal service upon each, such as would be necessary for the maintenance of an adversary suit *in personam*. *Pierce* v. *Prescott*, 128 Mass. 140. *Tyler* v. *Court of Registration*, 175 Mass. 71. *Bonnemort* v. *Gill*, 167 Mass. 338, 340. *Lamson* v. *Knowles*, 170 Mass. 295. Moreover, the interest of the estate of Ansel Weeks, Jr., as heir at law of his son Charles W. Weeks, was represented before the Probate Court by William L. Taber, the executor of the will of Ansel Weeks, Jr., who acknowledged in writing due notice of the petition, and requested that the petitioners be instructed and directed to pay over one quarter of the fund to Henry W. Taylor and Helen B. Ames. On November 3, 1858, Ansel Weeks, Sr., the paternal grandfather of the infant Charles W. Weeks, had been duly appointed administrator of his estate. This administrator died on August 5, 1876. Nearly twenty-eight years had elapsed between the

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time of his appointment and the filing of the petition for instructions on which this decree was made. Presumably all claims of creditors of the infant Charles W. Weeks, if there ever were any, had long been paid or barred, and his estate had been fully settled except as to this right in remainder, in which no one but his father, Ansel Weeks, Jr., had any interest. Under these circumstances we are of opinion that personal notice to Taber, the executor of the will of Ansel Weeks, Jr., through whom alone the widow and children could enforce their legal rights, was as effectual, in connection with the general publication, to give jurisdiction to the court, as like notice would have been to these claimants themselves. These claimants were then living in England, and have continued to live there ever since. We are of opinion that this decree of the Probate Court was effectual and binding upon the parties, in its operation upon that portion of the fund which was distributed under it. In this petition, which asks for instructions only in regard to the fund now in the hands of the petitioner, we cannot interfere with payments made under a valid decree of the court. *Sohier* v. *Burr*, 127 Mass. 221.

The decree had no effect upon the rights of the parties to other parts of the fund, which remained in the hands of the trustees. No question of law or fact was put in issue and adjudicated, in such a way as to work an estoppel against the further consideration of it at the request of any of the parties, when it arises in subsequent proceedings in court. *Shores* v. *Hooper*, 153 Mass. 228, 233. *Foye* v. *Patch*, 132 Mass. 105. *Bradley* v. *Bradley*, 160 Mass. 258.

After the payment by the trustees of one fourth of the fund under the decree, the remainder of it was vested in interest in equal one fourth parts in William Taylor, third, Sarah P. Warren, and Lydia B. Taylor, grandchildren of the testator and children ot his deceased son Henry Taylor, and in the claimants of the share of Charles W. Weeks. On the death of William Taylor, third, one undivided third of the fund was paid by the trustee to his son William W. Taylor, instead of the one fourth to which he was entitled; and on the death of Sarah P. Warren subsequently, one undivided half of the amount then remaining was paid to her daughter Anne Ashton Warren, instead of one fourth

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of the fund as it was before the payment to William W. Taylor. The claimants under Charles W. Weeks say that these two errors should be corrected in making disposition of the remainder of the fund now to be distributed. All claims for income are waived, and it is easy to correct the errors in accounting for and paying over the principal, especially as all persons interested are before the court, and the money in the hands of the trustee is sufficient to satisfy the just claims of all parties. The Probate Court has ample jurisdiction to compel the correction of such errors, even when they have been made under the authority of a decree of the court. *Harris* v. *Starkey*, 176 Mass. 445. Where they are made by the parties themselves, as these were, through a misunderstanding of their rights, it is plain that they should be corrected by a decree for the distribution of the remainder of the fund, in such a way as to make the entire payment to each that to which he was originally entitled.

After the expiration of more than forty-seven years since the death of Charles W. Weeks and the appointment of an administrator of his estate, we see no reason, under the circumstances here shown, for the appointment of an administrator *de bonis non* of his estate. It seems certain that the administrator *de bonis non* with the will annexed of Ansel Weeks, Jr. should receive the share of the principal to which Charles W. Weeks would be entitled if he were living. *Cummings* v. *Stearns*, 161 Mass. 506. *Buswell* v. *Newcomb*, 183 Mass. 111.

It has been contended that the representatives of Ansel Weeks, Jr. have been guilty of such laches as to deprive them of their interest in the fund. It appears that Ansel Weeks, Jr. was a mariner, who was absent upon the sea most of the time for many years until shortly before his death, and that his widow and children have lived in England, and have had no knowledge of the proceedings in 1886 in the Probate Court. The money has been held under an express trust, and at no time has there been a repudiation of the trust. We are of opinion that the amount necessary to correct the errors in the payments of the principal to William W. Taylor in 1888, and to Anne Ashton Warren in 1892, should be added to the fund now in the hands of the trustee, and one half of the amount so produced be paid over to George Purrington, Jr., administrator; and the other half of

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this amount be divided into four equal parts, one for William W. Taylor, one for Anne Ashton Warren, one for George Purrington, Jr., administrator, and one to be divided into two equal shares, of which Matilda G. Taylor of Worcester, administratrix of the estate of Henry W. Taylor, will receive one, and Helen B. Ames the other, — except that the one fourth part which is to go to William W. Taylor is to be diminished by deducting the amount of the overpayment to him on the death of his father, and the one fourth part which is to go to Anne Ashton Warren is to be diminished by deducting the amount of the overpayments to her on the death of her mother.

So ordered.

ANNIE E. McMAHON, administratrix, *vs.* ANNE LAWLER & another.

Suffolk. December 5, 1905. — February 27, 1906.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Gift. Trust. Savings Bank.

If a woman who has made deposits in a savings bank in her name as trustee for one of her sisters, the account having been begun by transferring to it the surplus of the depositor's own account in the same bank over $1,000 when that was the largest amount allowed to a depositor, declares a few weeks before her death to the two daughters of the sister named as beneficiary that the money belongs to their mother, then deceased, and will go to them and that others of the next of kin of the declarant cannot touch it, this can be found to be an admission that the deposit belonged to the sister named as beneficiary, a perfected trust having been created in her favor by way of gift.

THE following statement of the case is taken from the opinion of the court:

This is an appeal from a decree of a single justice reversing a decree of the Probate Court and allowing item 6 in the final account of Annie E. McMahon, administratrix of Bridget Lawler, deceased, intestate.

The next of kin of the intestate were a sister, Anne, two nieces, daughters of a deceased sister, Mrs. McMahon, and a third niece, a daughter of another deceased sister, Mrs. Kelleher

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One of the McMahon nieces was the administratrix and the item in dispute was the sum of $1,860.47, being the amount of a deposit in the Five Cents Savings Bank which the accountant had paid to the administrator of her mother's estate. This payment was disallowed in the Probate Court and on appeal allowed by a single justice of this court. From the decree of the single justice an appeal was taken by Anne Lawler, the surviving sister of the deceased, and the administrator of the niece Mrs. Kelleher, who had died after the intestate.

It appeared from the testimony taken by a commissioner that in 1871 or 1878 (both dates are stated in the report of the commissioner) the intestate had on deposit in the Five Cents Savings Bank (the savings bank in question) $1,225. She drew out $225 and deposited it in her own name, "Bridget Lawler, Trustee for Margaret Lawler," who was then married to a husband by the name of McMahon and was the mother of Annie and Emma McMahon. Three other deposits were made afterwards, interest was added, and no withdrawals were made. The two nieces Annie and Emma McMahon testified that a few weeks before the death of the intestate and after the death of Mrs. McMahon they had a talk with the intestate about her money. They said that it would go to the intestate's sister Anne and the niece Mary E. Kelleher "if she didn't fix up her affairs," to which she answered in the words of one of the two nieces referring to the deposit in question, "That money goes to you, — they cannot touch the money in the School Street bank, that belongs to your mother," or as it was put by the other of these two nieces, "Well, they can't touch the money in the School Street bank; that goes to you girls; they can't touch that. That money belongs to your mother, and it goes to you girls." The two nieces were corroborated in substance by a third person who was present, but she put it in this way: "She said she had a book in the School Street bank that was for the mother, and it would go to them; that she didn't want her sister or this other niece to have anything, because she wasn't on friendly terms with them." It appeared that when the account in question was opened, a by-law of the savings bank in question was in force limiting the sum of money that any depositor could have in the bank to $1,000.

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P. M. Keating, for Anne Lawler.

J. J. Dolan, for Matthew Dolan, administrator of the estate of Mary E. Kelleher.

H. Stevens, for the plaintiff.

LORING, J. [After the foregoing statement of the case.] If we give full credence to the fact testified to by the two nieces exactly as they put it, the decree of the single justice is right. What they testified to was an admission that the deposit in question belonged to the mother of those two nieces. The legal title to the deposit was confessedly in the intestate. If the deposit belonged to the sister of the intestate (the mother of the two nieces) it was because a perfected trust in the deposit had been created in favor of the sister and mother, by way of gift.

As matter of evidence it is ordinarily hard in such a case as that now before us to overcome the fact that the depositor who has deposited his own money in his own name in trust for another has retained the deposit book in his possession, but in this case, if full credence is given to the statement of the witnesses, it was overcome as in *Scrivens* v. *North Easton Savings Bank*, 166 Mass. 255, *Eastman* v. *Woronoco Savings Bank*, 136 Mass. 208, *Gerrish* v. *New Bedford Institution for Savings*, 128 Mass. 159.

In this case the single justice saw the witnesses on the stand and was thereby enabled to decide what credence should be given to their testimony. We see no reason for differing from the conclusion arrived at by him. *Regester's Sons Co.* v. *Reed*, 185 Mass. 226.

Decree affirmed.

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WILLIAM HACK *vs.* ROBERT W. NASON & another, executors.

Suffolk. December 6, 1905. — February 27, 1906.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Practice, Civil, Exceptions.

Under R. L. c. 173, § 106, as under previous statutes, a judge has no power to allow further time for filing exceptions on a motion made after the expiration of the twenty days prescribed for the filing.

CONTRACT. Writ dated May 1, 1903.

In the Superior Court the case was tried on February 28, 1905, before *Lawton*, J., who ordered a verdict for the defendants, and the plaintiff excepted.

The plaintiff did not file his exceptions with the clerk within twenty days after the verdict, and did not give any notice thereof to the adverse party within twenty days after the verdict was rendered; but thereafter, on March 27, 1905, the plaintiff filed in court a motion that the time within which his exceptions might be filed should be extended to include April 3, 1905, and with his motion filed an affidavit setting forth the reasons for the exceptions not being filed. At the hearing on this motion the plaintiff argued that R. L. c. 173, § 106, with its omissions and alterations in the language of the former statutes gave power to the judge to extend the time after the period of twenty days following the verdict had expired.

The judge denied the motion, with the following memorandum: "If I have the power to extend the time of filing I should extend it, but I rule that I have not the power." The plaintiff alleged exceptions to this ruling.

W. B. Grant, for the plaintiff.

J. F. Cronan & F. Ranney, for the defendants.

KNOWLTON, C. J. The only question in this case is whether, under the R. L. c. 173, § 106, after the expiration of the twenty days prescribed by statute as the time within which exceptions may be filed and notice of the filing given to the adverse party, the judge has power to allow further time. This has long been

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settled in the negative, by a line of decisions under earlier statutes substantially the same as this, except that the time allowed was shorter. *Commonwealth* v. *Greenlaw*, 119 Mass. 208. *Conway* v. *Callahan*, 121 Mass. 165. It has also been decided that the effect of the St. 1895, c. 153, § 1, was merely to extend the time within which exceptions may be filed and notice given, from three days to twenty days, and that, under this statute, after the expiration of the twenty days, the judge has no power to allow further time for the filing. *De Bang* v. *Scripture*, 168 Mass. 91. *Baron* v. *Fitzpatrick*, 167 Mass. 417. *Harrington* v. *Tykeson*, 182 Mass. 584. The adoption of this statute into the R. L. c. 173, § 106, preserves the identical words of the original, in reference to the extension of the time, namely, "unless further time is allowed by the court." Moreover, in *Dolan* v. *Boott Cotton Mills*, 185 Mass. 576, 579, the court, referring to the latest revision in the Revised Laws, pointed out the difference between the provision in question and the somewhat similar provision in the statute and rule of court in reference to the time for claiming a trial by jury. See also *Dorr* v. *Schenck*, 187 Mass. 542.

We think it plain that the statute, as it appears in the Revised Laws, should receive the same construction, in this particular, that has been given it in the former decisions.

Exceptions overruled.

C. AUGUSTUS HIXON & others *vs.* INHABITANTS OF SHARON & another.

Norfolk. December 7, 1905. — February 27, 1906.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Municipal Corporations. Tree Warden. Shade Trees.

A town lawfully can expend money to reimburse a tree warden for money expended by him in defending unsuccessfully a suit brought against him by the town for removing guide boards from shade trees in the village square placed there by authority of the town, if in doing the acts complained of and in defending the suit the tree warden was acting in good faith in the performance of what he believed to be a public duty.

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PETITION, filed April 24, 1905, by ten taxable inhabitants of the town of Sharon under R. L. c. 25, § 100, as stated in the opinion.

In the Superior Court *Richardson*, J. denied the injunction prayed for, and by consent of the parties reported the case for determination by this court. If the ruling denying the injunction was correct the petition was to be dismissed; if not correct, a permanent injunction was to issue.

F. G. Katzmann, for the petitioners.

H. F. Buswell, for the respondent William R. Mann.

T. E. Grover, for the town of Sharon, submitted a brief.

KNOWLTON, C. J. This is a petition brought by ten taxpayers of the town of Sharon, to enjoin the payment of money by the town treasurer, under a vote of the inhabitants of the town as follows: "That the town reimburse the tree warden the amount incurred in defence of the trees in the village square being used as guide posts, and $125 be appropriated for the purpose." The facts reported as the foundation of the vote are that the tree warden and deputy tree warden of the town undertook to prevent the use of certain trees in the highways and public square for the support of guide boards. A suit was brought by the town against these officers which is reported as *Sharon* v. *Smith*, 180 Mass. 539. They incurred expense in defending the suit, and the decision of the court was against them. The town having passed this vote for their reimbursement, the question is whether the vote was valid.

It may be assumed that the warden and his deputy acted in good faith in the performance of what they thought to be a public duty. They were charged with the general care of the shade trees in the public ways of the town. A suit was brought against them, founded on their official action, and it is found that they expended in the defence of this suit more than the sum now appropriated. An expenditure incurred in good faith in this way may properly be reimbursed by a town, provided that the town has a corporate right, duty or interest in the matter in respect of which the official mistake was made. *Nelson* v. *Milford*, 7 Pick. 18. *Bancroft* v. *Lynnfield*, 18 Pick. 566. *Babbitt* v. *Savoy*, 3 Cush. 530. *Fuller* v. *Groton*, 11 Gray, 340. *Lawrence* v. *McAlvin*, 109 Mass. 311. The cases in which it is

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held that a town cannot expend money to reimburse its officers or agents for losses are those in which the expenditure relates to objects concerning which it has no duty to perform, no interest to protect, and no right to defend. *Vincent* v. *Nantucket*, 12 Cush. 103. *Flood* v. *Leahy*, 183 Mass. 232.

Under our statutes towns have an interest in the shade trees in public places. They may make appropriations for planting shade trees in the public ways. R. L. c. 25, § 15. The officers having the care of public ways may authorize the planting of trees in them by individual landowners. R. L. c. 53, § 6. Trees in the public ways in cities cannot be cut down or removed against the determination of the mayor and aldermen. R. L. c. 53, §§ 7, 8. Regulations of the tree warden for the care and preservation of shade trees must be approved by the selectmen. R. L. c. 53, § 12. Statutory penalties for injury to or unlawful interference with shade trees go to the use of the town. R. L. c. 53, § 13; c. 208, § 102. These statutes, and others, give towns an interest in shade trees in the public ways which warrants the expenditure of public money for their protection and preservation. Although the tree warden and his deputy were mistaken in their view of the law, their action, presumably, was intended for the protection of the trees, and in this respect for the benefit of the town.

We must assume that the voters in town meeting took this view of their official action, and accordingly the vote is valid.

Petition dismissed.

EDWARD FRANKLIN *vs.* ELLEN FRANKLIN.

Plymouth. December 8, 1905. — February 27, 1906.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Marriage and Divorce. Husband and Wife.

A wife legally cannot refuse to accompany her husband in a reasonable change of domicil.

The wife of a skilful mechanic, both husband and wife being natives of England where they were married and where several children were born to them, who refuses to accompany her husband when he moves to America "to better his condition in life," and who on two occasions afterwards, when he has sent her

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money sufficient to bring her and the children then with her in a comfortable manner to America, again refuses to come, can be found to be guilty of utter desertion which will justify the granting of a divorce to her husband on this ground under R. L. c. 152, § 1.

KNOWLTON, C. J. The libellant and his wife are natives of England, where they were married in 1874, and where several children were born to them. The libellant, being a skilful mechanic, came to America "to better his condition in life" in 1891, and he has remained here ever since. His wife refused to accompany him, and he has not seen her since their separation. Some of their children have joined him here. He testified that, on two occasions after his arrival in America, he sent her sums of money sufficient to defray the expense of bringing her and the children who were then with her to America, in a comfortable and respectable manner. Once she kept the money but refused to come, and on the other occasion she refused to come, and returned a portion of the money. There is an averment in the libel that the libellant has continuously resided in this Commonwealth for the last five years, and we infer from the report that there is no question on this part of the case. On these facts the libellant asked for a decree of divorce *nisi* for desertion; but the judge declined to order a decree, and ruled that the libellee, in thus refusing to follow her husband to this country, was not guilty of desertion, and reported the case to this court. If the ruling was wrong and the evidence warrants it a decree *nisi* for desertion is to be entered.

If the libellee was guilty of desertion, there is no question as to the jurisdiction of the court. Jurisdiction depends upon the situs of the libellant, and not upon the place of the marriage, or of the commission of the offence against the marital relation. Under our statute, "If the libellant has lived in the Commonwealth for five years last preceding the filing of the libel, . . . a divorce may be decreed for any cause allowed by law, whether it occurred in this Commonwealth or elsewhere, unless it appears that the libellant has removed into this Commonwealth for the purpose of obtaining a divorce." R. L. c. 152, § 5. If, therefore, the evidence warrants a finding of utter desertion by the libellee, whether it occurred in England or in America, and if it continued for three consecutive years next prior to the filing of the libel, a divorce should be granted. R. L. c. 152, § 1.

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The fundamental fact to be considered is that the husband, as head of the family legally responsible for its support, has a right to choose and establish a domicil for himself and his wife and children. A refusal of the wife to stay with him in that domicil, without a sufficient reason for her refusal, is desertion. This right of the husband is not limited to the State or country in which the parties live at the time of their marriage, but in these days of easy communication between different countries and different parts of the same country, he may exercise it reasonably, in a way which will change his citizenship and allegiance. So far as he personally is concerned, if his duties to his wife are left out of consideration, this right is doubtless absolute. But in reference to the rights, duties and liabilities of the parties in their marital relations it is not absolute. It should be exercised with some reference to the welfare of the wife. We can conceive of a choice of a domicil so plainly unreasonable and improper, in reference to the health and welfare of the wife, that the selection of it, and an attempted enforcement of his general marital right to have her share it with him, would be extreme cruelty, such as would justify her in declining to accompany him or follow him to such a place of abode. His wife's marital right and his duty as a husband would come in conflict with the exercise of his general right to choose his own domicil, if he attempted to exercise the right in such a way as would be utterly and grossly unreasonable because of the peril to her life and health, and perhaps because of her deprivation of other things essential to her welfare. But the determination of such matters must, in the first instance and ordinarily, be left to the husband, upon whom rests the legal duty to provide for his family, as well as for himself. The wife cannot legally refuse to accompany him in a change of domicil unless such a change is plainly unreasonable. See *Keech* v. *Keech*, L. R. 1 P. & D. 641. *Hair* v. *Hair*, 10 Rich. Eq. 163. *Hardenbergh* v. *Hardenbergh*, 14 Cal. 654.

There is nothing in the present case to show a legal excuse for the wife's refusal. There was nothing very difficult in the distance, or in the time required for the journey, or in the discomfort attending it. The removal from the old home to the new one would have involved no change of race or language in

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the wife's companions. It included departure from her native land and separation from the friends of her youth. But these are no more than common experiences nowadays. In these years of emigration, to hold that a wife ought not to be required to accompany her husband from England to America, if his interests and those of his family would be greatly promoted by such a change, would impede social progress and individual advancement. We are of opinion that the ruling, as matter of law, that the libellee was not guilty of desertion, was erroneous.

In our opinion the evidence would warrant a finding that, without other excuse than her disinclination to leave her native land, she wilfully refused to accompany her husband to America when his interests and those of his family required such a change of domicil, and that she persisted in this refusal. This would justify a finding of utter desertion on her part.

The alleged desertion referred to in *Bishop* v. *Bishop*, 30 Penn. St. 412, occurred nearly fifty years ago, when conditions were very different from those at present, and the decision was made to depend upon a question of jurisdiction under the statutes of Pennsylvania.

Decree for the libellant.

P. A. Bridgham, for the libellant.

No counsel appeared for the libellee.

FRANCESCO MESISCO *vs.* FELICE GIULIANO & others & trustee.

Hampden. December 15, 1905. — February 27, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Equity Jurisdiction. Equity Pleading and Practice. Voluntary Association.

A suit in equity may be maintained to compel the reinstatement of the plaintiff as a member of a voluntary association from which he wrongfully has been expelled.

A bill in equity praying for the reinstatement of the plaintiff as a member of a voluntary association, from which it is alleged that he wrongfully has been expelled, and also praying that the defendants may be ordered to pay to the plaintiff the amount of his sick benefits and the amount of expenses which he has incurred for medical attendance, is bad on demurrer for multifariousness.

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BILL IN EQUITY, begun by writ dated August 10, 1904, alleging that the plaintiff was admitted as a member of an association founded by the plaintiff and the defendants called the Congregation of the Most Holy Lady of Mount Carmel, and that thereafter the defendants wrongfully expelled the plaintiff from that association, that the plaintiff was taken sick and rendered unable to work for a period of five weeks and that during his sickness the plaintiff expended large sums of money in employing a physician to attend him, and that under the constitution and by-laws of the association sick benefits were due to the plaintiff, praying, 1, for an order to the defendants directing that the plaintiff be reinstated as a member of the association, 2, that the defendants be ordered to pay the sick benefits to the plaintiff as provided by the constitution and by-laws, 3, that the defendants be ordered to pay the plaintiff what he has expended for medical attendance rendered necessary by the neglect or refusal of the association to provide medical attendance as provided by the constitution and by-laws, and, 4, for further relief.

The defendants demurred to the bill, alleging seven causes of demurrer, of which the first three, being those considered by the court, were as follows: 1. The plaintiff has not stated such a case as entitles him to any relief in equity against these defendants or any of them. 2. The plaintiff has a plain, adequate and complete remedy at law. 3. The amended bill is multifarious, in that distinct matters and different causes of action are joined therein which cannot properly be tried together.

The Superior Court sustained the demurrer and ordered that the bill be dismissed. The plaintiff appealed.

J. McKean, for the plaintiff.

J. L. Doherty & W. G. Brownson, for the defendants.

SHELDON, J. The defendants have demurred to the plaintiff's bill for lack of equity, because the plaintiff has a plain and adequate remedy at law, because the bill is multifarious and for other reasons.

1. We are of opinion that the court has jurisdiction in equity of a bill to compel the reinstatement of the plaintiff into the voluntary association from which he alleges that he has been wrongfully expelled. If this association were an incorporated body, his remedy might well be by mandamus, as in *Spilman* v. *Home*

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Circle, 157 Mass. 128. But courts of equity always have been accustomed, after such remedies as appear to be available within the society have been exhausted, to assume jurisdiction over mere voluntary associations, to protect the property rights of members who have been disfranchised or expelled in violation of the constitution or by-laws. See the cases cited in 9 Am. & Eng. Encyc. of Law, (2d ed.) 502.

2. Nor has the plaintiff an adequate remedy at law. Even if he could maintain an action for the amount of his sick benefits, a court of law could not restore to him the membership of which he has been deprived.

3. But we think that the bill is multifarious. The plaintiff seeks first to be restored to membership in the association, and then to have the defendants ordered to pay him the amount of his sick benefits and of the expense which he has incurred for medical attendance. But his right to recover these pecuniary damages may not be settled by the determination of his right to membership in the association. His rights to these two remedies are separate and distinct rights, depending upon different facts, and to be enforced by different means. For the first, he has the right to come into equity; for the second, his remedy is at law. It may turn out that he is entitled to one remedy and not to the other. *Davis* v. *Peabody*, 170 Mass. 397. *Sylvester* v. *Boyd*, 166 Mass. 445.

4. The other causes of demurrer do not require consideration.

Accordingly the decree of the Superior Court sustaining the demurrer must be affirmed; and the bill must be dismissed unless the plaintiff shall obtain leave in that court so to amend his bill as to cure the objection of multifariousness.

So ordered.

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COMMONWEALTH *vs.* THOMAS M. G. CALDWELL.

Essex. January 4, 1906. — February 27, 1906.

Present: KNOWLTON, C. J., MORTON, LATHROP, HAMMOND, & SHELDON, JJ.

Hawkers and Pedlers. Constitutional Law. Words, "Provisions."

Tea and coffee are not "provisions" within the meaning of R. L. c. 65, § 15, allowing provisions to be sold by hawkers and pedlers without a license.

The provisions of R. L. c. 65, §§ 15, 16, permitting hawkers and pedlers to sell agricultural products of the United States without a license and requiring a license for the sale of articles of the growth or production of foreign countries, are unconstitutional and void as an attempted regulation of commerce with foreign nations in violation of Const. of U. S. art. 1, § 8. Whether this unconstitutional part of the statute is so far separable from the rest of the statute, and of so little comparative importance, as to leave the other provisions of the statute in force was not considered.

COMPLAINT, received and sworn to in the Lynn Police Court on September 29, 1905, charging the defendant with going from place to place in Lynn, exposing for sale and selling goods, wares and merchandise, to wit, tea and coffee, which were of the growth or production of foreign countries, without a license, the same not being among the articles enumerated in R. L. c. 65, § 15, as those which may be exposed for sale and sold without a license.

On appeal to the Superior Court the case was tried before *Gaskill*, J. The following facts were agreed: On the date set out in the complaint the defendant went from place to place in Lynn exposing for sale and selling tea and coffee to householders for domestic use. The tea and coffee were of the growth or production of foreign countries. The defendant had no license from the secretary of the Commonwealth issued under R. L. c. 65, §§ 19–21. The acts of the defendant were not in violation of any ordinance or by-law of the city of Lynn. No testimony, other than the agreed facts, was introduced.

The defendant asked the judge to rule as follows: 1. Upon the whole case no offence has been made out. 2. If any offence under the statute has been made out, the statute is in conflict

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with the Constitution of the United States. 3. If any offence under the statute has been made out, the statute is in conflict with the Constitution of Massachusetts.

The judge refused to give any of the rulings requested, and instructed the jury that the evidence justified a verdict of guilty. The jury returned such a verdict; and the defendant alleged exceptions.

H. T. Lummus & C. N. Barney, for the defendant.

W. S. Peters, District Attorney, for the Commonwealth.

KNOWLTON, C. J. The defendant was prosecuted under the R. L. c. 65, § 16, for peddling tea and coffee without a license. Section 15 of this chapter permits the sale of provisions without a license, and the first question in the case is whether tea and coffee are provisions, within the meaning of this section. We think that they are not. The word "provisions" as here used has been held to mean, "food, victuals, fare, provender." *Commonwealth* v. *Lutton*, 157 Mass. 392. *Commonwealth* v. *Reid*, 175 Mass. 325. Tea and coffee are not used as food, in the form in which they are sold by shopkeepers. They are used to make decoctions, to be taken as a beverage for their agreeable taste or their stimulating effect. In this respect they are not very different from wine and beer, which in many countries are in common use at meals. We are of opinion that they are not included in the term "provisions," in its ordinary sense, or in the meaning of this statute.

The next question is whether the statute is a regulation of commerce, in violation of art. 1, § 8, of the Constitution of the United States, which provides that, "The Congress shall have power . . . to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." The statute permits the sale by pedlers of agricultural products of the United States without a license, while it forbids unlicensed sales of agricultural products of other countries. Many agricultural products are articles of commerce, and in this respect there is, in the statute, a discrimination in favor of articles produced in the United States. It has been held many times that such an attempt at discrimination by a State is of no effect. *Welton* v. *Missouri*, 91 U. S. 275. *Cook* v. *Pennsylvania*, 97 U. S. 566. *Guy* v. *Baltimore*, 100 U. S. 434. *Brown*

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v. *Maryland*, 12 Wheat. 419. *Commonwealth* v. *Petranich*, 183 Mass. 217. *Higgins* v. *Three Hundred Casks of Lime*, 130 Mass. 1. *State* v. *Pratt*, 59 Vt. 590. *State* v. *Furbush*, 72 Maine, 493. The cases enunciating the general doctrine in the Supreme Court of the United States are very numerous, and many of them are cited and reviewed by Mr. Justice Gray, in *Emert* v. *Missouri*, 156 U. S. 296. While in many of them the discrimination was against articles coming from other States, the rule in reference to discrimination against articles of foreign production is the same. In *Cook* v. *Pennsylvania*, 97 U. S. 566, 573, Mr. Justice Miller said: "If a tax assessed by a State injuriously discriminating against the products of a State of the Union is forbidden by the Constitution, a similar tax against goods imported from a foreign State is equally forbidden." In *Guy* v. *Baltimore*, 100 U. S. 434, 439, the general rule is stated by Mr. Justice Harlan as follows: "It must be regarded as settled that no State can, consistently with the Federal Constitution, impose upon the products of other States, brought therein for sale or use, or upon citizens because engaged in the sale therein, or the transportation thereto, of the products of other States, more onerous public burdens or taxes than it imposes upon the like products of its own territory." In reference to the contention that the general rule should not apply after the imported goods have been mingled with the general mass of property in the State, this is the statement of Mr. Justice Field, in *Welton* v. *Missouri*, 91 U. S. 275: "The commercial power continues until the commodity has ceased to be the subject of discriminating legislation by reason of its foreign character. That power protects it, even after it has entered the State, from any burdens imposed by reason of its foreign origin." We are of opinion that the discrimination in this statute between agricultural products of the United States and agricultural products of other countries, in reference to the requirement of a license to peddle them, renders the statute unconstitutional in this particular.

Other questions were raised by the defendant in regard to the constitutionality of the statute, some of which, in my opinion, well might be decided at this time. But a majority of the justices do not think it necessary to the decision of this case, nor

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desirable, that they should now be considered, and we do not consider them.

Whether the unconstitutional part of the statute renders the whole statute invalid, or leaves its other provisions in force if there is no other valid objection to them, depends upon whether it is so far separable from the rest, and of so little comparative importance, that the Legislature presumably would have enacted the other portion without it, if the attention of the Legislature had been directed to its unconstitutionality. See *Edwards* v. *Bruorton*, 184 Mass. 529; *Commonwealth* v. *Petranich*, 183 Mass. 217; *Commonwealth* v. *Anselvich*, 186 Mass. 376, 379.

Exceptions sustained.

MARY HABERLIL *vs.* CITY OF BOSTON.

Suffolk. March 8, 1905. — February 28, 1906.

Present: KNOWLTON, C. J., LATHROP, HAMMOND, & BRALEY, JJ.

Suffolk. December 4, 1905. — February 28, 1906.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Elections. Voting Booth. Municipal Corporations. Boston. Way, Defect in highway.

R. L. c. 11, § 186, does not confer on the aldermen of cities and the selectmen of towns, nor in Boston upon the board of election commissioners, the right to place a voting booth in the travelled part of a public street.

A vote of the board of aldermen of the city of Boston granting permission to the board of election commissioners to place voting booths in the streets of that city does not confer the right to place a voting booth in the travelled part of a public street, the aldermen having no power to give such a right.

A voting booth illegally in the travelled part of a public street may be found to constitute a defect in the highway.

TORT for personal injuries caused by an alleged defect in Seventh Street, a highway of the defendant, consisting of a voting booth with a large board projecting from one side standing in a travelled portion of the highway. Writ dated December 13, 1901.

At the trial in the Superior Court before *Hardy*, J. the defendant showed that the voting booth was placed in Seventh

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Street by a person acting under authority from the board of election commissioners and that the projecting board was used to designate the ward and precinct of the booth. The defendant also put in evidence the following order of the board of aldermen of the defendant passed on September 11, 1901, and approved by the mayor on September 12, 1901: "Ordered: That permission be granted the board of election commissioners to place in the streets in this city such polling booths as may be necessary for use at the coming state and city elections, and at such special elections as may be held during the coming year; such booths to be so placed as to incommode the public as little as possible, and to be removed immediately after the city election or such special elections."

The plaintiff testified that she lived on Seventh Street and was crossing the street to go after her little boy who was near the booth, that she had placed one foot on the sidewalk and was near the boy when her head struck the board, and that she did not see the board until after the accident when she looked up and saw that it was the projecting board she had struck against.

The judge ruled that the plaintiff could not maintain the action, and ordered a verdict for the defendant. The plaintiff alleged exceptions.

The case was argued at the bar on March 8, 1905, before *Knowlton*, C. J., *Lathrop*, *Barker*, *Hammond*, & *Braley*, JJ. On December 4, 1905, it was reargued before *Knowlton*, C. J., *Hammond*, *Loring*, *Braley*, & *Sheldon*, JJ.

J. E. Cotter, (*J. P. Fagan* with him,) for the plaintiff.

A. L. Spring, for the defendant.

HAMMOND, J. The first question is whether the voting booth was lawfully in the public street. It was a one story structure, twenty-five feet long, about ten feet wide, and it was placed within the travelled part of the street, one side of it resting upon the curbstone of the sidewalk and the remainder extending out into the street. The defendant relies upon R. L. c. 11, § 186, which so far as material reads as follows: "The aldermen in cities and the selectmen of every town divided into voting precincts shall, thirty days at least before the annual state or city election and ten days at least before any special

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election of a state or city officer therein, designate the polling place for each voting precinct and shall cause it to be suitably fitted up and prepared therefor. It shall be in a public, orderly and convenient portion of the precinct; but if no such polling place can be had within the precinct, they may designate a polling place in an adjoining precinct. No building or portion of a building shall be designated or used as a polling place in which intoxicating liquor has been sold within the thirty days preceding the day of the election." This is a general law applicable throughout the Commonwealth except that in Boston this power is vested in the board of election commissioners of that city instead of the mayor and aldermen.*

In construing this statute it is to be noted that there is no language explicitly providing that a polling place may be located in a street. The natural and easy reading of the language is that this polling place is to be located in a building and consequently in a place where buildings generally are located, namely, not in the travelled part of a street but outside the limits of the street, or at least outside the part worked for public travel. It is to be further noted that the possibility is contemplated that the officers charged with this duty may be unable to find in a precinct a suitable polling place, and in such case a polling place may be designated in an adjoining precinct. This possibility scarcely could arise if it were contemplated that the polling place could be located upon the travelled part of a street or highway. The business of voting has no necessary or natural relation to the purpose to which the travelled part of a highway is devoted, and the establishment of a polling place thereon which shall be large enough to meet the requirements of the statute as to the accommodations required for the voters and the election officers must interfere very materially with the public travel. The ground worked and used as the travelled part of a street is already devoted to one public purpose, and its use for this purpose is not to be interrupted except by language expressly or by necessary implication authorizing such interruption. In view of these considerations we are of opinion that the statute does not confer upon the election commissioners the right to

* See Revised Charter of Boston, St. 1895, c. 449, §§ 3–8.

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locate a polling booth in the travelled part of a public street. Nor could the vote of the aldermen passed September 11, 1901, confer any such authority. The case is clearly distinguishable from cases like *Young* v. *Yarmouth*, 9 Gray, 386; *Cushing* v. *Bedford*, 125 Mass. 526; *Washburn* v. *Easton*, 172 Mass. 525; and other similar cases cited by the defendant. The booth was illegally in the street, and may be properly found to constitute a defect. *Griffin* v. *Boston*, 182 Mass. 409, and cases there cited. This being so, it was the duty of the defendant to exercise reasonable diligence to protect the public travel.

The questions of the due care of the plaintiff and of the negligence of the defendant were for the jury.

Exceptions sustained.

ROBERT G. HARRIS *vs.* NORTH AMERICAN INSURANCE COMPANY.

Essex. November 8, 9, 1905. — February 28, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & BRALEY, JJ.

Insurance, Fire. *Evidence*, Extrinsic affecting writings. *Practice, Civil.*

A building in process of construction is not an "unoccupied building" within the meaning of that term included in a list of prohibited risks furnished by a fire insurance company to its agents.

A provision in a policy of fire insurance, that the policy shall be void if the insured premises become vacant by the removal of the owner or occupant and so remain vacant for more than thirty days without the assent in writing or in print of the company issuing the policy, cannot be waived by an oral agreement of an agent of the company.

In an action on a policy of fire insurance on a dwelling house, which is not described either as occupied or unoccupied, the plaintiff may show by oral evidence that the insured building was a dwelling house in process of construction which could not be inhabited until completion.

A policy of fire insurance in the Massachusetts standard form contained the usual provision that it should be void if the premises thereby insured should become vacant by the removal of the owner or occupant, and should so remain vacant for more than thirty days without the assent in writing or in print of the company. The policy was issued to the owner of a house in process of construction described as a "frame dwelling house" and contained permission "for mechanics to work in and about said premises for thirty days from date," which subsequently was extended for a further period, at the end of which the

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contractor turned over the house to the owner completed with the exception of water connections for which it was necessary to wait until water pipes were extended in the street on which the house stood. While the owner was waiting for an appropriation to be made by the town for this purpose the house remained empty for more than thirty days, but the owner lived in another house on the same tract of land about one thousand feet from the insured building which was in sight of himself and his family and which he passed daily in going to and from his work. Before the date of the town meeting at which the appropriation for the extension of the water pipes was expected the house was destroyed by fire. In an action on the policy the defences were set up of a forfeiture of the policy by the premises becoming vacant or by an increase of risk. *Held*, that the house had not become vacant by the removal of the owner or occupier within the meaning of the policy, and that the question whether allowing the house to remain vacant after the mechanics left while the plaintiff was exercising the supervision shown by the evidence increased the risk of fire was an issue of fact which properly should be submitted to the jury, if the defendant wished to go to the jury on this branch of the defence.

In an action on a policy of fire insurance where the defendant's answer contains a general denial and allegations of two specific defences of forfeiture under the terms of the policy, and where neither in its pleadings nor during the trial has the defendant set up the defence that the action cannot be maintained because the plaintiff has not performed the condition precedent of submitting the amount of his loss to arbitration, the defendant at the argument before this court of its exception to a refusal of the judge to rule that upon all the evidence the action cannot be maintained, cannot raise the question of this new defence which if relied upon might have been raised by demurrer or answer and which has not been disclosed during the trial.

CONTRACT on two policies of fire insurance in the Massachusetts standard form issued by the defendant, a corporation organized under the laws of this Commonwealth, on a "frame dwelling house" in Marblehead, one for $3,000 dated October 10, 1901, and the other for $500 dated November 5, 1901. Writ dated July 29, 1902.

The answer contained a general denial, and further alleged that, if any such loss and damage as alleged in the plaintiff's declaration occurred, the premises insured by the policy became vacant by the removal of the owner and occupant during the continuance of the policy and so remained vacant for more than thirty days without the assent in writing or in print of the defendant company, and that the policy thereby became void; and, further, that without the assent in writing or in print of the defendant company the situation and circumstances affecting the risk were by and with the knowledge, advice, agency and consent of the insured so altered as to cause an increase of such risk, and the policy thereby became void.

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At the trial in the Superior Court before *Hardy*, J. it appeared that the building insured was destroyed by fire on March 3, 1902; that the building insured was a new two story frame dwelling house in course of construction; that at the time of issuing the first policy the house was about three fourths completed, and at the time of issuing the second policy the house was very nearly completed; that its owner, the plaintiff, intended to occupy the house himself, and then lived in another house on the same tract of land about one thousand feet from the insured building; that on or about November 15, 1901, the building was completed with the exception of making water connections, and was turned over to the plaintiff by the contractor; that for the water connection it was necessary to wait for water pipes to be extended in Jersey Street and from thence to the house.

The agent of the company testified that he knew at the time the plaintiff came to him to effect insurance that the building was in course of construction, and was nearly completed; and that by reason of his own knowledge a mechanic's permit, subsequently extended, was placed on the first policy at the time of effecting the insurance; that he was at the premises about a week after he issued the first policy, but did not go inside the house.

Evidence was introduced by the plaintiff against the objection and exception of the defendant tending to show that the plaintiff had dug a trench on his land for the laying of water pipes from Jersey Street to the house, a distance of two hundred and forty-eight feet, and that before effecting the insurance the plaintiff had made an application to the water board of the town of Marblehead for a supply of water for the house; that before he could obtain the supply it was necessary that the water pipes in Jersey Street should be extended by the town to the land on which the insured building stood; that an appropriation of money by the town for the purpose was necessary, and that the water board was to bring the matter before the town meeting in the March following; that the March meeting of the town did not occur until after the fire which destroyed the building, and that the plaintiff did not intend to occupy the building until after the question of appropriation

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at the town meeting had been acted upon; that there was no other supply of water on the premises, and that he was waiting for a water supply before moving into the house. If the appropriation was not voted by the town he intended to build a cistern for his water supply, but not until after the town meeting in March.

Evidence also was introduced by the plaintiff against the objection and exception of the defendant tending to show that these facts were communicated to the agent of the defendant by the plaintiff at the time of making the contract and before the issuing of the first policy of insurance.

During the whole period from the time of effecting the first policy to the time of the fire the building had not been occupied by any one except by the mechanics under the permits; and it was agreed that the building insured was wholly vacant and unoccupied between November 16, 1901, and the date of the fire; but the plaintiff during this time lived in the other house on the premises and was in and about the house insured from time to time, passed by it daily in going to and from his work and had the building in view from his other house by himself and family.

Each policy contained the following printed clause: "This policy shall be void . . . if the premises hereby insured shall become vacant by the removal of the owner or occupant and so remain vacant for more than thirty days without the assent in writing or in print of the company."

The plaintiff was permitted against the objection and exception of the defendant to testify that when he applied for the insurance he informed the agent, one Hathaway, that the premises would not be occupied until a date later than the date of the fire. The defendant objected to this testimony on the ground that it was immaterial and tended to vary a written contract by oral evidence. The only increase of risk relied upon by the defendant in support of its answer was the vacancy and unoccupancy of the building after the mechanics had left it and it had been turned over to the plaintiff. It appeared that the premium generally charged by insurance companies for vacant and unoccupied buildings was more than the rate charged on these policies, and more than the rate charged for occupied buildings.

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At the time the policies were issued, Hathaway had received from the company, and had in his possession a printed alphabetical list of risks with the caption "List of Prohibited Risks" which began with "alms-houses," ended with "woolen mills" and included "unoccupied buildings and idle manufactories." But this list was unknown to the plaintiff and was not communicated to him at any time before the fire.

The defendant offered the list in evidence and the judge admitted it against the objection and exception of the plaintiff.

At the close of the evidence the defendant asked the judge to rule as follows:

"1. The parties made a special provision as to the conditions then existing. They wrote into the body of the policy the words: 'Permission is hereby given for mechanics to work in and about the insured premises thirty days from date.'

"This permission allows mechanics to have such possession of the house as to make it impossible to occupy the house as a dwelling house while the possession of the mechanics continues; it therefore included a permission for the house to remain vacant thirty days, so far as a house in and about which mechanics are at work during ordinary working hours can be said to be vacant.

"This was equivalent to saying 'This is our contract in reference to the present condition of the buildings. Except as modified by this contract the policy is deemed to be, what in other parts it purports to be, a policy of insurance upon buildings now occupied for dwelling purposes. By our language we have chosen to make a contract relating to property so occupied, except for the short period of thirty days (extended in the first policy to fifty-six days, and expiring in the case of each policy December 4, 1901) during which it may remain insured under this special agreement as unoccupied, or partially unoccupied property.'

"The effect of this arrangement taken as a whole was to leave the rights of the parties after December 4, 1901, the same as if the building had been occupied when the insurance was effected. By the original provisions of the policy it was insured as an occupied building. The usual provision was inserted as to its becoming vacant and remaining vacant more than thirty days.

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Then an exception was written in which took it out of the general provisions of the contract and insured it as a building occupied by mechanics only (to such extent as they occupy it when at work in and about it) up to and including December 4, 1901, but no longer.

"2. Permission given in the policies for the house to be vacant except for the presence of mechanics working about it having expired December 4, 1901, and the house having been entirely vacant without the assent of the defendant in writing or in print for more than thirty days before the fire in March, 1902, there was a breach of the conditions of the policy before the fire and the policies thereby became void.

"3. Apart from the fact of the permit for mechanics to occupy the house in this case, if the house had been insured as a dwelling house, with no such permit, when it was in fact vacant, and the company knew when they insured it that it was vacant, that fact would not constitute a waiver of the condition that the policy shall be forfeited if the premises remain vacant thirty days without the assent of the company in writing or in print. A clause making provision for the future cannot thus be waived.

"4. The agent, Hathaway, had no authority to insure vacant buildings, to grant an oral permit for vacancy or to waive the condition against vacancy by parol.

"5. Where the waiver relied on is an act of an agent, it must be shown that the agent had express authority from the company to make the waiver or that the company subsequently with knowledge of the facts ratified the action of the agent.

"6. There is no evidence to sustain a verdict for the plaintiff on either count, and the jury should return a verdict for the defendant upon both counts of the declaration."

The judge refused to give these rulings and the defendant excepted. Thereupon the judge submitted the following issues to the jury directing them to answer the second issue in the negative, there being no evidence other than what might be inferred from the policies themselves that the company had any other knowledge than that of its agent as to the unoccupancy of the building. The evidence upon the first issue was conflicting.

The issues and answers of the jury were as follows:

"1. Did the insurance agent, Mr. Hathaway, have knowledge

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by information from Mr. Harris or otherwise at or before the execution or delivery of the policies that the premises were to be unoccupied between December 4, 1901, and March 3, 1902? Answer. Yes.

"2. Did the insurance company have any actual knowledge at the time of the execution of the policies or before their delivery that the premises were to be unoccupied between December 4, 1901, and March 3, 1902? Answer. No.

"3. What was the loss on the dwelling house including foundations by the fire under the terms of these policies? Answer. $3,500."

Upon receiving the answers of the jury the judge directed the jury to return a verdict for the plaintiff in the sum of $4,039.50, which it was agreed by the parties included interest on the loss or damage found by the jury in answer to the third issue. The jury returned a verdict as directed, and the defendant excepted. The judge reported the case for determination by this court. If his direction, rulings and refusals to rule were correct, or if upon the facts the plaintiff was entitled to a verdict, the verdict was to stand; otherwise, judgment was to be entered for the defendant or such other entry was to be made as justice might require.

B. G. Davis, for the defendant.

J. M. Raymond, (*E. C. Battis* with him,) for the plaintiff.

BRALEY, J. Upon their face the policies which are in the standard form required by R. L. c. 118, § 60, purport to set forth the full provisions of the contract. The defendant endeavors to avoid payment of the loss which has accrued by showing that the building insured either became vacant for more than thirty days before the fire by the removal of the owner without its written or printed assent, or was left under such conditions as materially to increase the risk. Although completed as a structure, the building when burned never had been occupied as a residence, and at the date of insurance was in process of erection. The local agent of the company by whom the policies were issued was informed by the plaintiff of these general conditions, and that it was his purpose not to occupy the house as a home until a time which was subsequent to the fire, but this knowledge was not otherwise communicated to the defendant.

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In the list of prohibited risks which it furnished to its agents "unoccupied buildings" were included, but the exception to a refusal to rule that the agent was thus prohibited from insuring the plaintiff's building calls for no comment, as a new building in process of construction cannot be so classified. But the plaintiff, in dealing with a local agent who was authorized to issue policies and collect premiums was required to take notice that by their terms the scope of his authority did not include the power orally to change the clause of the contracts relating to vacancy. *Harrison* v. *City Ins. Co.* 9 Allen, 231. *Kyte* v. *Commercial Union Assur. Co.* 144 Mass. 43, 46. *Harnden* v. *Milwaukee Mechanics' Ins. Co.* 164 Mass. 382, 386. Any modification or alteration of this nature could be made only with the written or printed assent of the insurer. *Worcester Bank* v. *Hartford Ins. Co.* 11 Cush. 265. *Northern Assur. Co.* v. *Grand View Building Assoc.* 183 U. S. 308.

Neither could they thus be changed if put upon the ground of waiver arising impliedly from the actual situation of the premises at the time the policies were issued, communicated to him by the plaintiff, but of which the agent independently might have been found to have had knowledge, for this provision referred to a possible future, and not a present use of the property. *Batchelder* v. *Queen Ins. Co.* 135 Mass. 449.

As the agent had no authority to assure the plaintiff that the defendant would not insist upon a strict compliance, he could not, under the doctrine of waiver invoked by the plaintiff, either by assent in words or by conduct, alter or surrender this contractual right of his principal, if it is found to have any application in the present case. *Stone* v. *Howard Ins. Co.* 153 Mass. 475, 480, 481, and cases there cited. *Metropolitan Coal Co.* v. *Boutell Transportation & Towing Co.* 185 Mass. 391, 397.

Having been, however, regularly issued, duly accepted, and the premiums paid, the contracts of insurance became binding upon the company, and the remaining questions are, whether there has been a breach of this particular condition, or an unauthorized increase of risk, either of which would be sufficient to avoid them.

The defendant contends that treating the physical presence of

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the mechanics under the permits as a sufficient compliance to satisfy the requirement as to occupancy, yet after they left as the house remained empty and unfurnished for more than thirty days before the fire, the issuance of the permits should be held to have the same modifying effect upon the contracts as the words "permission to remain vacant thirty days without prejudice," found in the policy construed in *Newmarket Savings Bank* v. *Royal Ins. Co.* 150 Mass. 374, 376. But the qualifying phrase there used had reference to and was directly connected with the condition relating to vacancy, and upon combining the two they were held in effect to constitute an agreement to insure the property as unoccupied for a period of thirty days, after the expiration of which it was to be treated as being within the clause relating to unoccupancy.

The permission given the plaintiff here was "for mechanics to work in and about the insured premises thirty days from date", and evidently was designed to prevent a forfeiture which otherwise might arise under the provision as to increase of risk set forth in the body of the policies, where it is said that if without the printed or written consent of the company, "the situation or circumstances affecting the risk shall . . . be so altered as to cause an increase of such risks," they shall become void. *Luce* v. *Dorchester Ins. Co.* 105 Mass. 297, 301.

The burden was on the defendant strictly to prove an avoidance of its liability by showing that the acts of the plaintiff in connection with the insured property amounted to a removal from the house, and produced a forfeiture. *Ferguson* v. *Union Ins. Co.* 187 Mass. 8, 14. *Hitchcock* v. *Northwestern Ins. Co.* 26 N. Y. 68. *Orrell* v. *Hampden Ins. Co.* 13 Gray, 431, 434. *Butternut Manuf. Co.* v. *Manufacturers' Ins. Co.* 78 Wis. 202.

No doubt there is a sound practical distinction recognized in the community between a house that becomes merely unoccupied for a longer or shorter period, though fitted and furnished as a domicil, and one that becomes vacant by the removal of the furniture, and departure of the owner. *Herrman* v. *Adriatic Ins. Co.* 85 N. Y. 162. The words, "become vacant by the removal of the owner or occupant," on which the defendant so strongly relies, have received judicial construction by this court in *Johnson* v. *Norwalk Ins. Co.* 175 Mass. 529, 531, where it is

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held that in accordance with this common understanding "they refer to a permanent removal and entire abandonment of the house."

But the house is not described either as occupied or unoccupied, and there being no warranty or presumption of either present or future occupation, parol evidence that it was in process of erection, and hence could not be inhabited in the sense of being a residence until completion did not contradict the written instrument, and was admissible. *Westfield Cigar Co.* v. *Insurance Companies*, 165 Mass. 541, 545. See *Blood* v. *Howard Ins. Co.* 12 Cush. 472; *King Brick Manuf. Co.* v. *Phœnix Ins. Co.* 164 Mass. 291, 294; *Mead* v. *Phenix Ins. Co.* 158 Mass. 124, 125.

The burden was on the plaintiff to prove that the building burned was a dwelling house, and it was open to the defendant to show that it was something else, and hence uninsured. *Thomas* v. *Commercial Union Assur. Co.* 162 Mass. 29, 34.

If it then had appeared that the defendant intended to insure one kind of a building which the plaintiff had described, and the building burned was not of that class there would have been no meeting of the minds of the parties and therefore no contract. *Goddard* v. *Monitor Ins. Co.* 108 Mass. 56.

In describing the designated premises as a dwelling house when taken in connection with his representations, which because they are material under R. L. c. 118, § 21, are incorporated though not expressed in the policies, all that the plaintiff undertook to perform was that when occupied the building should be used for this purpose. *Ring* v. *Phœnix Assur. Co.* 145 Mass. 426, 429. *Cumberland Valley Mutual Protection Co.* v. *Douglas*, 58 Penn. St. 419.

It could have been found by the jury that it was not inaccurate to describe the house as within the class commonly designated as dwelling houses equally when in process of erection as well as when finished, and that there was no misunderstanding concerning the identity of the subject matter, even if a more technically accurate description would have been "a dwelling house now in process of erection which upon completion, and when ready for occupancy will be occupied by the insured." See *Royal Ins. Co.* v. *Lubelsky*, 86 Ala. 530.

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While not conceded by the defendant, no satisfactory reason has been advanced whereby in the ordinary course of human affairs it can be said that the plaintiff has removed from a residence he never had furnished or inhabited, although legally in his possession and subject to his direct supervision, being built on his homestead lot.

Indeed, it would be a contradiction of terms, if not absurd to say that the house ever became vacant by the bodily removal of the "owner or occupant."

Recognizing the practical difficulty of sustaining such an argument, the defendant insists that as matter of law the premises became vacant within the meaning of the policies, and relies upon *Wainer* v. *Milford Ins. Co.* 153 Mass. 335, 338, as sustaining the proposition, that in contemplation of the parties removal and subsequent vacancy must be held to have begun at the expiration of the permits.

In that case although the policy was dated January 23, 1889, the dwelling house was not occupied between that date and April 1, 1889, and it was said that, "if the policy was in force from its date, it was therefore rendered void." But it was not necessary to decide this question as the decision turned upon the inquiry as to when the policy took effect, and it was held that it did not become effective by delivery until March 12, 1889. As the fire was on May 12, 1889, it would follow that the house had not been vacant for more than thirty days.

This position, moreover, if anything more was meant than to say that the policy was avoided by an increase of risk caused by the vacancy, is not supported by the cases to which reference is there made. *Lyman* v. *State Ins. Co.* 14 Allen, 329, 334, turns upon the issue whether the act of the plaintiff had increased the risk under a policy which apparently did not contain any clause as to vacancy. While *Kyte* v. *Commercial Union Assur. Co.*, *ubi supra*, also was decided under a policy which provided that it should be void if without the company's assent the risk was increased, and the remaining authority of *Hinckley* v. *Germania Ins. Co.* 140 Mass. 38, rests upon the effect of the act of the assured in keeping a bowling alley and pool table in avoiding a policy for the same reason. This decision, therefore, cannot be considered as decisive of the case now before us.

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It having been found that when the policies were issued the agent understood that the insured had not occupied, and could not occupy the dwelling house then being built in the sense of living in it as a home for himself and family until finally ready for occupancy, the clause relating to unoccupancy of the insured premises, as no change appears to have taken place, must be construed in connection with these conditions under which the parties entered into their contracts. *Germania Ins. Co.* v. *Klewer*, 129 Ill. 599.

Even after substantial completion, and while waiting for the necessary addition of some form of service by which water could be supplied it cannot be said that, never having been inhabited by him the house had become vacant because the owner removed therefrom, for such a subsequent condition upon the facts here found manifestly becomes inapplicable. *Ring* v. *Phœnix Assur. Co.*, *ubi supra*. *Newmarket Savings Bank* v. *Royal Ins. Co.*, *ubi supra*, at page 376, and cases there cited. *Commercial Ins. Co.* v. *Spankneble*, 52 Ill. 53, 60. *Alexander* v. *Germania Ins. Co.* 66 N. Y. 464. *Philadelphia Tool Co.* v. *British American Assur. Co.* 132 Penn. St. 236. *Woodruff* v. *Imperial Ins. Co.* 83 N. Y. 133.

There is a further provision that any increase of the risk by the act and with the consent of the plaintiff avoids them. But the question whether allowing the house to remain vacant after the mechanics left increased the hazard of its taking fire was an issue of fact under the circumstances shown by the evidence offered by the plaintiff of his supervision and care, and which was admissible for this purpose, although the defendant finally did not ask to go to the jury on this branch of its defence. *Allen* v. *Massasoit Ins. Co.* 99 Mass. 160. *Luce* v. *Dorchester Ins. Co.* 105 Mass. 297. *Powers* v. *Guardian Ins. Co.* 136 Mass. 108, 110.

A portion of the evidence to the admission of which the defendant excepted related to the laying in the street by the town of a water pipe with which the house was to be connected, and for which the plaintiff's application to the water board was pending at the date of the fire. This was accompanied by further proof that at the time the insurance was effected under the first policy the agent was informed that the plaintiff's pur-

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pose was not to occupy the house until arrangements had been made for supplying it with water, and also that he knew this service could not be provided until a date subsequent to its destruction.

It is now urged that the defendant was prejudiced by the admission of this, as well as other testimony that the plaintiff dug trenches on his land for the pipes, and that the pipe in the street could not be laid unless the town at its annual meeting voted an appropriation, but the evidence cannot be said to have been wholly irrelevant as it had some tendency to support the plaintiff's narrative of his original statements to the agent when obtaining the insurance, and to show that they were not an afterthought.

By the sixth request the defendant in substance asked for a ruling that upon all the evidence the action could not be maintained, and this having been refused it now further contends that compliance with the precedent condition of submitting the amount of loss to arbitration not having been shown, nor its waiver pleaded, the suit is prematurely brought. *Lamson Consolidated Store Service Co.* v. *Prudential Ins. Co.* 171 Mass. 433.

There is, however, not the slightest suggestion in the record that in any form this question was raised, or even alluded to at the trial, and the parties evidently proceeded upon other and distinct issues which are presented by the report.

If the defendant had considered the declaration insufficient for want of proper averments as to this clause in the policies it might have demurred. *Lamson Consolidated Store Service Co.* v. *Prudential Ins. Co., ubi supra.* Instead of doing so it filed an answer containing a general denial, with other specific defences to which reference already has been made, so that after proof of the making of the contracts, and the loss of the insured property by fire, the case was tried on two questions: whether the premises had become vacant within the meaning of the policies, or the risk had been increased.

It plainly appears that the defendant did not, either by a direct request for a specific ruling, or by any form of pleading, explicitly raise the question which it now endeavors to present, and the ruling requested must have been understood by the pre-

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siding judge as relating solely to the issues presented and the evidence which had been introduced, and not as including a defence which was not only undisclosed, but which might have been definitely pleaded. If either course had been adopted the plaintiff undoubtedly would have been afforded an opportunity to amend, but in going to trial upon pleadings which in terms did not raise this question, and by the course pursued up to the time when the case was submitted to the jury, the defendant must be deemed to have waived its right to set up this defence. *Edwards* v. *Carr*, 13 Gray, 234, 238. *Goodnow* v. *Hill*, 125 Mass. 587. *Tilden* v. *Greenwood*, 149 Mass. 567. *Lyon* v. *Prouty*, 154 Mass. 488. *Fairman* v. *Boston & Albany Railroad*, 169 Mass. 170. *Oulighan* v. *Butler*, 189 Mass. 287.

By the terms of the report the order must be,

Verdict to stand.

WILLIAM A. FAY *vs.* JOHN J. WALSH & others.

Essex. November 10, 1905. — February 28, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & BRALEY, JJ.

Partnership. Witness. Agency. Practice, Civil.

In an action against the members of an alleged partnership of three persons for the price of lumber used in building an open air theatre, where the first defendant was defaulted and the case was defended by the second and third defendants on the ground that they were not partners of the first defendant, it appeared that the first defendant in the presence of the second defendant had ordered from the plaintiff lumber which had been paid for, that later the first and second defendants ordered more lumber which the plaintiff refused to sell on credit, a balance being due him on a previous order, that the first defendant then said that the next day he would have some one down to pay for the lumber and the balance of the old account, that the next day the second and third defendants came to the plaintiff's office and the second defendant introduced the third defendant "as the moneyed man of the concern," that the second defendant at the request of the third defendant then stepped out, and thereupon the third defendant asked the plaintiff how much the bill was and paid it, and on the plaintiff saying that he did not feel like sending any more lumber "down there" the third defendant told him that he was a man of means and that "he was in the concern," and "as to sending goods down there everything would be all right and the bills would be paid," and that he wanted the bills made out to the first defendant. The action was for the price of lumber supplied on the faith of this statement, the bill having been made out to the first

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defendant. No objection was made at the trial in behalf of the second defendant to the evidence of what was said after he stepped out of the office. The judge refused to rule that there was no evidence of partnership. He instructed the jury that the second defendant was not bound by the conversation unless they should find that he went there and introduced the third defendant as the financial man of the concern, and that this was done for the purpose of getting credit, and if the jury so should find, they then might take into consideration the other evidence with that of the introduction in determining whether the second defendant was a partner to the scheme, and, if he was, might find against him and all the defendants. *Held*, that the rulings were correct. *Held, also*, that the fact that the bill was made out to the first defendant did not prevent recovery against the other defendants, if the bill was made out in this way at the request of the third defendant and he was acting for the second defendant as well as for himself in making the request.

A plaintiff, testifying as to the amount of an order for materials furnished by him to the defendant, may be allowed to refresh his recollection from entries made in an account book by his bookkeeper.

One who sells goods or materials acting as the agent for another, and sends the bill on paper with a heading giving the name of his principal and his own name as agent, cannot maintain an action for the price of the goods or materials in his own name. The action must be brought in the name of the disclosed principal.

Where in an action for goods sold and delivered or materials furnished, brought by an agent who acted in the transaction for a disclosed principal, the presiding judge in the Superior Court refuses to order a verdict for the defendant, without the defendant calling his attention to the fact that the action ought to have been brought in the name of the principal, and the plaintiff obtains a verdict, on exceptions to this ruling alleged by the defendant this court may order that the exceptions be sustained unless the plaintiff is allowed by the Superior Court, after hearing the defendant, to amend his writ and declaration by substituting the principal as plaintiff and the plaintiff does so amend, and may order that if such an amendment is allowed and made the exceptions shall be overruled.

LORING, J. This is an action brought to recover $225.33 for lumber, used in building an open air theatre at Nahant, which the plaintiff alleged was sold by him to the defendants Walsh, Howard and Fletcher, jointly, on July 1, 2 and 3, 1901. The defendant Walsh was defaulted, and the case was defended by Fletcher and Howard. At the conclusion of the evidence the defendants Fletcher and Howard requested the judge to rule that the defendants were entitled to a verdict and that there was no evidence of a partnership. These rulings were refused, and the case is here on exceptions "to the judge's refusal to rule as requested and to his rulings inconsistent therewith," and to certain rulings on evidence stated in the opinion.

1. We think that there was evidence that these two defendants were liable with Walsh as partners.

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The plaintiff testified that, before his first interview with the defendant Fletcher, Walsh had ordered lumber in Howard's presence, which had been paid for, and that on the day before this first interview Walsh and Howard had ordered some lumber which he refused to sell on credit, a balance being due him on a previous order; that Walsh thereupon said that he would have some one down to pay for the lumber ordered and the balance on the old account the next day. The next day he, the plaintiff, found Howard and Fletcher at his office when he came in about noon, and Howard introduced Fletcher "as the moneyed man of the concern." Howard then stepped out on being asked to do so by Fletcher, and after Howard had gone Fletcher asked how much the bill was, and he, Fletcher, paid it. The plaintiff testified that he told Fletcher before Fletcher paid the bill that he did not feel like sending any more lumber "down there," and Fletcher told him that he, Fletcher, was a man of means; that "he was in the concern," and "as to sending goods down there he said everything would be all right and the bills would be paid," and he wanted the bill made out to Walsh. The lumber here in question was subsequently supplied on the faith of this statement.

If Howard was bound by what was said by Fletcher after he stepped out of the room leaving Fletcher and the plaintiff by themselves, this was sufficient evidence against both Fletcher and Howard. No objection in behalf of Howard was made to the introduction of this evidence at the trial. The judge instructed the jury that "Howard is not bound by that conversation except you find this was a scheme to get this lumber, and that he was a party to it, and except you find he went up there and introduced him as the financial man of the concern, and that was done for the very purpose of getting credit. If you find that, then you may take the other evidence with that introduction in determining whether Howard was a partner to that scheme, as claimed by the plaintiff, and if he was, then you may find against him and all."

This exception must be overruled.

2. The fact that the bill was made out to Walsh was not fatal, there being evidence that this was done at Fletcher's request. *James* v. *Spaulding*, 4 Gray, 451. Under the instructions of the

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judge the jury must have found that Fletcher was acting for Howard in making this request.

3. The plaintiff could be allowed to refresh his recollection by a memorandum made by another.* *Commonwealth* v. *Burton*, 183 Mass. 461. *Commonwealth* v. *Ford*, 130 Mass. 64.

4. No exception was taken to the admission of the leading questions objected to by the defendants.

5. The plaintiff testified that "the bills were made out on the bill heads of James Fairfield on which was printed 'William A. Fay, Agent,'" and that "at the time of the sale of the lumber in question, he was selling lumber for James Fairfield; that he was acting as James Fairfield's agent in selling the lumber in question."

The defendants have contended that this action ought to have been brought in the name of Fairfield, and for that reason the first ruling requested by them, asking for a verdict for the defendants, should have been granted. It is plain that the action should have been brought in Fairfield's name, *Borrowscale* v. *Bosworth*, 99 Mass. 378, and this ruling should have been given.

So far as appears this objection is purely technical. It is one which could have been avoided by amendment had it been called to the attention of the judge. Had the defendants told the judge that the reason they asked for a verdict as matter of law was that the action was brought by the wrong person, the judge in his discretion could have allowed an amendment substituting Fairfield for Fay. *Costelo* v. *Crowell*, 134 Mass. 280. More than that, such an amendment can be allowed now after verdict. *Campbell & Zell Co.* v. *Barr Pumping Engine Co.* 182 Mass. 304. *Hayward* v. *Leeson*, 176 Mass. 310, at pp. 324, 326. See also *Fenton* v. *Lord*, 128 Mass. 466.

There are precedents in similar cases for making an entry in this court of "Exceptions overruled," upon the proper amendment being made in the Superior Court. *Keller* v. *Webb*, 126 Mass. 393. *Fenton* v. *Lord*, 128 Mass. 466. *Denham* v. *Bryant*, 139 Mass. 110. In the case of *Peck* v. *Waters*, 104

* The plaintiff, against the defendant's exception, was allowed to refresh his recollection as to the amount of the first order for lumber by inspecting the entries made in an account book by his bookkeeper in the regular course of her work, she not being present in court.

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Mass. 345, this court, in a similar case, sustained the exceptions for the sole purpose of having such amendment made in the Superior Court. It is plain that the statement made in *Whitney* v. *Houghton*, 127 Mass. 527, that this court has power to allow such an amendment is erroneous. To the same effect see *Stone* v. *White*, 8 Gray, 589.

It may be that the defendants' rights would be affected by the substitution of Fairfield for Fay as plaintiff, and for that reason they should have an opportunity to be heard on the allowance of such an amendment.

Unless such an amendment is allowed and made in the Superior Court the exceptions will be sustained. If such an amendment is allowed and made the exceptions will be overruled.

So ordered.

W. H. Brown, for the defendants Fletcher and Howard, submitted a brief.

R. L. Sisk, for the plaintiff.

PETER A. FAY *vs.* JOHN L. HUNT & another.

Middlesex. November 13, 1905. — February 28, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Practice, Civil. Bills and Notes. Contract, Consideration.

If a party who has taken many exceptions at a trial submits his case to this court on a brief those exceptions not argued in his brief will be treated as waived, although he states in his brief that he relies on all the objections set forth in his exceptions.

A defendant sued on a promissory note cannot show, in the absence of fraud, that he did not know the contents of the note when he signed it and thought that another person was the payee.

The holder of a promissory note can maintain an action on it without showing any beneficial interest.

A promise to end proceedings, in which a defendant has been arrested on an execution under R. L. c. 168, § 1, cl. 3, on the ground that he is an attorney at law and that the debt was for money collected by him for the plaintiff which he unreasonably neglected to pay to the plaintiff, is a good consideration for a promissory note signed by the defendant as maker and by another as surety, and the consideration is good against the surety as well as against the maker.

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Under R. L. c. 173, § 48, the refusal of a presiding judge to allow a defendant to amend his answer is a matter of discretion, and, if the judge thinks that the purpose of an amendment is vexation and delay and not to enable the defendant to make a legal defence, it is proper for him to deny the motion to amend.

THE following statement of the case is taken from the opinion of the court:

This is an action on a promissory note signed by the defendant Hunt as principal and the defendant Holt as surety.

It appeared at the trial that the plaintiff Fay, an attorney at law, brought an action in the Lowell Police Court in the name of one Hall, for the benefit of the Boston and Maine Railroad against the defendant Hunt, and recovered judgment. From this Hunt took an appeal to the Superior Court and the defendant Holt became surety on the appeal bond. Judgment for the plaintiff was recovered in the Superior Court, execution issued, and the defendant Hunt was arrested under what is now R. L. c. 168, § 1, cl. 3, last paragraph, that is to say, on the ground that Hunt was an attorney at law and that the debt sought to be recovered was for money collected by the defendant for the plaintiff and Hunt unreasonably had neglected to pay the same to the plaintiff. At a hearing in these proceedings the plaintiff offered to end the proceedings if Hunt would pay the costs to that date in cash, and, with the defendant Holt as surety, give a note for the balance of the judgment. The defendants agreed to do this. The costs were paid in cash, and the defendants executed and delivered to Fay the note of which the note now in suit is a renewal, the defendant Hunt believing, so he testified, that the payee was the Boston and Maine Railroad, until after the note had been put in the bank. This note was discounted at a Lowell bank, and when it came due the defendants executed and delivered the note in suit in renewal, with the consent of the plaintiff.

On the day before the trial both counsel stated to the judge that they were ready for trial. After the jury was empanelled, the defendant Hunt moved to amend the answers by adding as a defence duress in obtaining the original note in renewal of which the note in suit was given. The motion had been filed two days before the trial, and notice was sent to the plaintiff. The presiding judge refused to allow the amendments because

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he thought they came too late in a case where the attorney who filed the answers was himself a defendant and necessarily familiar with all the facts. To this refusal the defendants excepted.

The defendants offered the record of the proceedings in the Police Court of Lowell to show the amount of the original judgment and the course of proceedings in the police court, but the judge excluded the evidence and the defendants excepted.

The defendant Hunt offered evidence to show that the proceedings in the police court seriously affected his health and their influence in inducing him to sign the note; but the judge excluded the evidence and the defendant excepted.

The defendant asked for the following rulings: (1) That Fay is not a holder of the note in the case in good faith and for a valuable consideration. (2) That he is not a holder in due course. (3) That the note "is subject to the same defences as if it were non-negotiable." (4) That Fay must show that he has a good title to the note. That the evidence does now show that Fay has a good title to it. (5) That if Fay obtained the note or any signature thereto by fraud, duress, or force or fear, or other unlawful means or for any illegal consideration, he has no title to it and cannot maintain this action. That he did obtain the note by duress and fraud. (6) That the defendant Holt is an accommodation party, and is liable to Fay only in case he received a valuable consideration, and no consideration to him has been shown in this case. (7) That the burden of proof is on the plaintiff to show that there was a lawful promise and a legal and valuable consideration for the note in this action, and that the note was taken in good faith, and that the plaintiff is a holder in due course, and by a good title, and that if he does not furnish such proof in these respects, he cannot maintain this action. (8) That the plaintiff is limited to his pleadings, and to the transaction of the note in question. (9) That there was no previous debt or demand of the plaintiff for which the note was given, and that it was *nudum pactum*. (10) That the plaintiff has furnished no sufficient evidence to maintain this action.

The judge refused to give the rulings requested, and instructed the jury that the plaintiff could maintain the action although he

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had no personal interest in the note; to this refusal and instruction the defendants excepted. Instructions to which no exception was taken were given in regard to the burden of proof and the necessity for a consideration for the note.

The jury returned a verdict for the plaintiff for the amount of the note with interest.

The case is here on these exceptions.

J. L. Hunt, for the defendants.

P. A. Fay, pro se.

LORING, J. [After the foregoing statement of the case.] The defendants in their brief state that they rely upon all objections set forth in the exceptions. None, therefore, are waived. We do not think it necessary, however, to notice those not argued.

The law presumes, in the absence of fraud, that the defendants read the note signed by them. *Grace* v. *Adams*, 100 Mass. 505.

The holder of a promissory note who has no beneficial interest in it can maintain an action on it. *National Pemberton Bank* v. *Porter*, 125 Mass. 333. *Haskell* v. *Avery*, 181 Mass. 106.

There was evidence of a consideration for the original note in the promise to end the proceedings in the police court if the note was given. It further appears, if material, that this promise has been kept; no further proceedings in the police court were ever taken. If the defendants had wished to have those proceedings dismissed of record, they could have had that done.

Holt, the surety, is liable if he gave the note in consideration of the promise to end the proceedings in the police court. If authority were needed for this it may be found in the case relied on by the defendants, *Sumner* v. *Williams*, 8 Mass. 162.

The amendment of the answer was a matter entirely within the discretion of the Superior Court. R. L. c. 173, § 48. *Richmond Iron Works* v. *Woodruff*, 8 Gray, 447. *Smith* v. *Whiting*, 100 Mass. 122. If the presiding judge was satisfied that the purpose of the amendment was vexation and delay and not the setting up of what was honestly thought to be a defence, it was proper to refuse the defendants' motion.

Exceptions overruled.

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CHARLES FINNICK *vs.* BOSTON AND NORTHERN STREET RAILWAY COMPANY.

Middlesex. November 14, 1905. — February 28, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Negligence. Street Railway.

A motorman running a special electric car in the early morning before daylight along a track where no regular cars run at that hour, the electric headlight according to his own testimony throwing a pencil of light for about a thousand feet about eight feet wide which shut out from his view objects outside of its ray, going at a high rate of speed without sounding his gong at cross streets at a time when persons ordinarily using such streets would not expect a car to be on the track, can be found to be negligent, and the railway company employing him can be found to be liable to a milkman whose wagon after coming from a cross street is struck from behind with great violence by the special car.

In an action by a milkman against a street railway company for injuries to the plaintiff and his horse and wagon from being run into from behind by a car of the defendant, it appeared that the plaintiff was driving in his milk wagon in the early morning before daylight along his regular route and came from a cross street into a street on which were tracks of the defendant, that his wagon was struck from behind with great violence by a special car of the defendant running at a high rate of speed, that the plaintiff had driven over the milk route for ten years and during that time never had seen a car on the tracks at that place at the hour that the accident occurred, that the time for the first regular car was forty minutes after the hour of the accident, and that before his wagon was struck by the car he did not hear the sound of a gong or any notice or warning from the men in control of the car. *Held*, that the plaintiff could be found to have been in the exercise of due care.

There is no absolute rule of law that a person to exercise due care must look and listen before crossing the track of an electric street railway.

TORT for injuries to the plaintiff and to his horse and wagon from being run into by an electric car of the defendant at the time and in the manner described in the statement of the court. Writ dated July 15, 1904.

At the trial in the Superior Court before *Wait*, J. the jury returned a verdict for the plaintiff in the sum of $267.50.

The following statement of the case is taken from the opinion of the court:

The plaintiff, a milkman, was delivering milk on his regular route about half past four in the morning of April 15, 1904,

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when he was injured by being run into from behind by a special car of the defendant. The accident happened on Gorham Street, in the city of Lowell, just north of Cosgrove Street, which runs at right angles to Gorham Street. The plaintiff, who had been delivering milk in Cosgrove Street, drove in an easterly direction down Cosgrove to Gorham, turned into Gorham to drive north to Anderson Street, a street leading out of Gorham Street on the same side as Cosgrove Street. Gorham Street was forty feet wide between the curbstones; in the centre there was a double track of the defendant company, and the space between the easterly track and the east curbstone was ten and one half feet. As the plaintiff swung into Gorham Street his nigh wheels "went over" between the rails of the easterly track of the defendant. The plaintiff testified "that as he drove his horse and wagon easterly out of the tracks to get into the space between the easterly curbstone of the street and the easterly rail of the defendant and before his hind wheel had left the rail the car of the defendant going northerly struck his team when about sixty feet from Cosgrove Street." He was thrown from his seat to the ground, the wagon was pushed along Gorham Street about twenty feet after it was struck by the car, up against a post, and came to a stop about one hundred feet beyond the post. The plaintiff also testified that he had driven over the milk route for ten years, never had seen a car go by "there" at the hour in question during that time, and that the time for the first regular car was ten minutes after five. He admitted that "he did not look in any direction for a car or listen for a car or think anything about a car as he drove up Cosgrove Street and on to Gorham Street"; that at the time of the accident it was not daylight but gloom, and that "at no time before his wagon was struck by the car did he hear any gong strike, or hear any notice or warning of any kind from the men who had control of the car."

The defendant introduced evidence that the car was a special car which had been to Billerica and was on its way back; that it was going ten or twelve miles an hour; that the plaintiff's wagon was seen by the motorman when the car was "about fifty feet from the southerly line of Cosgrove Street"; that at the time the horse "was just turning from Cosgrove to Gorham

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Street"; that "he applied the brake and the reverse but before he could bring the car to a stop it struck the hind wheel of the plaintiff's wagon; that a bright electric headlight threw a pencil of light about eight feet in width and confined to the track for a distance of about one thousand feet, and which shut out the motorman's view of objects outside the ray of said pencil." The defendant also introduced evidence of snow plows and sand cars which ran over the tracks between 11.20 P. M. and 5.10 A. M.

At the close of the evidence the defendant asked for a verdict as matter of law. This was refused, and the defendant took an exception.

The presiding judge instructed the jury that "A person in approaching a street railway track is not bound by any strict rule of law, as when he approaches a steam railroad crossing, to stop and look and listen, or to take special precautions in order to determine whether there is danger to him in going upon the tracks; but, while the law does not say that he must stop and look and listen, it does say that he must use the degree of care which an ordinarily prudent and careful person would exercise, placed in the same position, and it is for you to say whether, upon the evidence in this case, the plaintiff has produced a fair preponderance of testimony to show that he was acting when he turned from the side street out upon Gorham Street and drove along Gorham Street, with a degree of care which a reasonably prudent and careful person would exercise." To this instruction the defendant excepted.

The case is here on these exceptions.

W. D. Turner, for the defendant.

J. J. Hogan, for the plaintiff, was not called upon.

LORING, J. [After the foregoing statement of the case.] 1. In its argument that there was no evidence of negligence on the part of the defendant, the defendant has assumed that the car was going ten or twelve miles an hour. But that assumption is not warranted. The jury were not bound to believe the testimony of the defendant's witnesses. If they believed (as they were warranted in believing on the evidence) that the wagon was struck sixty feet north of Cosgrove Street and was pushed along Gorham Street about twenty feet after it was

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struck by the car and up against a post, and that the car did not stop until it was about one hundred feet beyond the post although the brake and the reverse were applied when the car was fifty feet south of the southerly line of Cosgrove Street, they could find that the car was going much faster than twelve miles an hour. In considering whether the defendant was guilty of negligence the jury could consider that the motorman testified that his electric headlight threw a pencil of light eight feet wide which shut out the motorman's view, and yet he was running his car at the high rate of speed indicated by what occurred, and without sounding his gong at cross streets when persons using such streets would not ordinarily expect a car to be on the track. We are of opinion that they were justified in finding that the defendant was negligent.

2. The difference between the case at bar and the Massachusetts cases cited by the defendant, (*Hall* v. *West End Street Railway*, 168 Mass. 461; *Kelly* v. *Wakefield & Stoneham Street Railway*, 175 Mass. 331; *Hurley* v. *West End Street Railway*, 180 Mass. 370; *Dooley* v. *Greenfield & Turners Falls Street Railway*, 184 Mass. 204; *Gleason* v. *Worcester Consolidated Street Railway*, 184 Mass. 290; *Dunn* v. *Old Colony Street Railway*, 186 Mass. 316; *Black* v. *Boston Elevated Railway*, 187 Mass. 172; *Saltman* v. *Boston Elevated Railway*, 187 Mass. 243; *Seele* v. *Boston & Northern Street Railway*, 187 Mass. 248,) in support of its contention that as matter of law the plaintiff was guilty of contributory negligence, is that in those cases the accident happened at a time when cars were to be expected to be running on the tracks in question.

In addition the defendant has cited the case of *Butler* v. *Rockland, Thomaston & Camden Street Railway*, 99 Maine, 149. The plaintiff in that case was struck by a train of lime rock cars, and it is stated in the opinion that "it appears that the plaintiff knew that the defendant was running trains of lime-rock cars" in addition to the passenger cars shown on its schedule. We do not know how far the court intended to go by this further statement in that opinion: "And in any event the defendant had the right to run cars when it chose, and it was the duty of the plaintiff to exercise some care to look out for them."

3. The defendant has argued that the presiding judge was

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wrong in telling the jury that "a person in approaching a street railway track is not bound by any strict rule of law, as when he approaches a steam railroad crossing, to stop and look and listen, or to take special precautions in order to determine whether there is danger to him in going upon the tracks." The distinction between the two is settled in this Commonwealth. *Robbins* v. *Springfield Street Railway*, 165 Mass. 30. *Hall* v. *West End Street Railway*, 168 Mass. 461, 462. *Donovan* v. *Lynn & Boston Railroad*, 185 Mass. 533, 535.

Exceptions overruled.

JAMES A. McINNIS *vs.* BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. November 15, 1905. — February 28, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Witness. Evidence.

In an action against a street railway company for personal injuries, the defendant contended that the plaintiff was injured while attempting to get on a moving car when he was intoxicated. The plaintiff's wife, when cross-examined as to what she had said in reference to the accident to a woman who kept a grocery, denied telling the woman that her husband had gone down the harbor with two fellows from Everett or telling her that he had been drinking. The woman who kept the grocery was called by the defendant as a witness and was asked in regard to the plaintiff's wife "Did she tell you where her husband had been?" This was objected to by the plaintiff and admitted by the judge as competent to affect the credibility of the plaintiff's wife, if she said anything inconsistent with her statements on the stand, and ruled that the statement was "material if she testified as to her husband's condition." The plaintiff excepted to the ruling. The witness answered: "She came in again, and said I should trust her again, without her old bill being paid, because he went away yesterday without leaving any money, and he was drinking, and he was hurt, and she couldn't find any money in his pocket." *Held*, that, even treating the question as not a merely preliminary one, it was competent to ask the witness where the plaintiff's wife said that her husband had been, for the purpose of impeaching the wife's credibility as a witness, and that the answer, which was not responsive, was not in question, no objection having been made to it and no motion having been made to strike it out.

TORT for personal injuries alleged to have been sustained while the plaintiff was a passenger on a car of the defendant. Writ dated September 16, 1902.

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At the trial in the Superior Court before *Hardy*, J. the jury returned a verdict for the defendant, and the plaintiff alleged exceptions, raising the single question contained in the following statement taken from the opinion of the court:

The only question presented by this case is one of evidence.

The plaintiff was run over by a car of the defendant railway company. His contention was that while riding on the running board he was thrown off through the negligence of the conductor. The defendant's contention was that he was injured in attempting to board the car when he was intoxicated and while it was in motion.

The plaintiff's wife testified that he left home at six A. M. on the day of the accident, and she did not see him again until she found him at the hospital the next day, Thursday. On cross-examination she testified that her husband had been paid off the day before the accident, and in answer to the question "He had a good deal of money when he left the house that morning?" she answered, "No, he didn't have much." She further testified on cross-examination that she had had no conversation with "Mrs. Symonds, who keeps a grocery," with reference to the accident to the plaintiff; at least she did not remember that she had; and in answer to the question "Do you remember telling her your husband had gone down the Harbor with two fellows from Everett?" she said "No; I didn't know he went down the Harbor." She also testified that she did not tell Mrs. Symonds that he had been drinking. The defendant called Mrs. Symonds and asked her this question: "Did she tell you where her husband had been?" This was objected to by the plaintiff and was admitted as "competent to affect the credibility of" the plaintiff's wife, "if she said anything inconsistent with her statements on the stand," and that "the statement is material if she testified as to her husband's condition." To this ruling the plaintiff saved an exception. Mrs. Symonds then testified that "She came in again, and said I should trust her again, without her old bill being paid, because he went away yesterday without leaving any money, and he was drinking, and he was hurt, and she couldn't find any money in his pocket."

The defendant had a verdict, and the case is here on this exception.

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James J. McCarthy, for the plaintiff.

J. L. Hall, for the defendant.

LORING, J. [After the foregoing statement of the case.] Passing by the fact that the question was in fact a preliminary one and treating it as a question asking where she said her husband had been, it was competent for the purpose for which it was admitted. The answer was not responsive. No objection was made to the answer and no motion was made to strike it out. The only exception before us is the exception to the question. That exception must be overruled.

So ordered.

ANN McMAHON *vs.* CITY OF BOSTON.

Suffolk. November 16, 1905. — February 28, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Way, Defect in highway. *Negligence.*

In an action for injuries from an alleged defect in a highway, if it appears that the plaintiff was injured in crossing a portion of a street undergoing repairs, and there is evidence on which it could be found that there were no barriers at the place where the plaintiff was injured, the defendant has no right to have an instruction given that the defendant is not liable to a person crossing at a place without a barrier if the jury find that the street was properly protected by barriers at the two ends of the part under repair and at the cross streets, as the question whether such barriers if they existed were sufficient is one of fact for the jury.

A woman who on her way home from church on a Sunday morning attempts to cross a street which she knows has been closed and undergoing repairs, but before doing so looks to see whether the repairs are completed at that place and thinks that they are, can be found to be in the exercise of reasonable care in attempting to cross without ascertaining that the crossing is safe.

MORTON, J. This is an action of tort to recover for personal injuries sustained by the plaintiff by reason of an alleged defect in Blue Hill Avenue, a public highway in the defendant city. There was a verdict for the plaintiff, and the case is here on exceptions by the defendant to the refusal of the judge to give certain rulings that were requested.

The accident occurred on Sunday, June 30, 1901, at about ten A. M. The plaintiff had been to church and was on her way

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home. She lived on Quincy Street which crosses Blue Hill Avenue at right angles. Blue Hill Avenue runs nearly north and south. The church was on the easterly side of the avenue about two blocks north of Quincy Street, and her home was on the northerly side of Quincy Street about the same distance westerly of Blue Hill Avenue. When she went to church she came down Quincy Street and up the westerly sidewalk of the avenue, crossing opposite the church. Returning, she came down the easterly sidewalk till she reached Quincy Street where she attempted to cross. She crossed on a cross walk of flagging over the easterly part of the street and over the car tracks, but somewhere between the last rail and the westerly sidewalk, fell and received the injuries complained of. Blue Hill Avenue was being repaired and was torn up northerly of Quincy Street; but the easterly roadway between the car tracks and the sidewalk had been finished.

One question was whether the defendant had put up suitable barriers to warn the public of the condition of the street. The plaintiff testified that on her right as she crossed, that is on the northerly side of the crossing, there was no horse or barrier, that there was none across Quincy Street; and that on her left, that is on the southerly side of the crossing, she did not notice, but did not think there was any barrier. The defendant concedes that the evidence was conflicting on this point, and that there was sufficient testimony to justify the jury in finding that there were no barriers. But it contends that its request that the defendant was not liable to a person attempting to cross where no barrier was encountered if the jury found that the street was properly protected by barriers at the two ends of the part under repair and at the cross streets should have been given. But to have given the instruction thus requested would have been saying to the jury, in effect, that, as matter of law, such barriers, if found to exist, would be sufficient. The question whether there were barriers there and, if so, whether they were reasonable and proper was one of fact for the jury and was left to them under suitable instructions. See *Jones* v. *Collins*, 188 Mass. 53.

The other instructions requested related to the plaintiff's due care and her right to recover upon all the evidence. The

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defendant asked the judge to rule that if the plaintiff knew that that part of the street, where she was injured, had been under repair and closed to travel, it was contributory negligence for her to attempt to cross without first ascertaining whether the work had been completed and the crossing was safe, and that on all the evidence she could not recover. The fact that the plaintiff knew that the street had been under repair and closed to travel would not of itself be conclusive against her right to recover. *Norwood* v. *Somerville*, 159 Mass. 105. *McGuinness* v. *Worcester*, 160 Mass. 272. She testified that "she looked to see before she crossed the street; it was all clear, all right as she thought. . . . That the east side was completed and she thought the west side was." It is true that the jury might disbelieve her. But it would have been error to instruct them, as matter of law, that it would have been contributory negligence or lack of due care on her part to attempt to cross without ascertaining whether the work had been completed and the crossing was safe if she knew that the street had been closed and undergoing repairs. Whether she was in the exercise of due care depended upon a consideration of all of the circumstances of which her knowledge that the street was undergoing repairs was one. It may be that there are cases in which the presence or absence of a single fact is so controlling as to be decisive one way or the other on the question of due care; but we do not think that could be said of the plaintiff's neglect in this case, if she did neglect to ascertain whether the work had been completed and the crossing was safe before she attempted to cross. The evidence as to the condition of the crossing at the westerly end was conflicting. Several witnesses, one of whom was the sub-foreman of the paving department of the defendant city and inspector of the work of repairing the avenue, and the others police officers, testified that the flagstone crossing had been completed before the accident, and that at no time was there a temporary crossing of paving stones. Other witnesses testified that there was a temporary crossing of paving blocks. The plaintiff's testimony left the matter in doubt. If, as the defendant contends, she climbed down into the excavation and stumbled over heaps of material that had been brought or left there, it is clear that she would not be entitled to recover; but it was for the jury, we think, to

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say what the condition was, and whether taking it as they found it to be the plaintiff was in the exercise of due care in attempting to cross.

Exceptions overruled.

P. Nichols, for the defendant.

J. C. Johnston, for the plaintiff.

FRANCIS E. McDONALD *vs.* BENJAMIN F. DUTTON & others.

Middlesex. November 16, 1905. — February 28, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Negligence. Elevator.

The proprietor of a freight elevator which passes between a sub-basement and the sidewalk of a street through an elevator well with a stone coping at the top and its sides below the coping covered with plaster which is scratched and banged in the operation of the elevator is not negligent toward his employees who make use of the elevator in failing to repair a hole in the plaster just below the coping five or six inches wide, two and a half inches high and from an inch to an inch and a half deep, in which the toes of an employee are caught under the coping as the elevator is ascending.

An employee making use in the course of his employment of a freight elevator maintained by his employer assumes the risk of an injury occasioned by the walls of the elevator well being covered with plaster instead of a harder material.

TORT for personal injuries sustained in the manner described in the opinion while on a freight elevator maintained by the plaintiff's employers in their building on Pemberton Square in Boston. Writ dated November 4, 1902.

At the trial in the Superior Court before *Gaskill*, J. the judge refused to rule that on all the evidence the plaintiff could not recover, and also refused to make other rulings requested by the defendant which the decision of the court has made immaterial. The jury returned a verdict for the plaintiff in the sum of $2,500; and the defendants alleged exceptions.

R. Spring, (*F. B. Kendall* with him,) for the defendants.

W. I. Badger, (*W. H. Hitchcock* with him,) for the plaintiff.

LORING, J. This is an action of tort for personal injuries to

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an employee while he was riding on his employers' freight elevator.

The plaintiff was a boy between fifteen and sixteen years of age, and we assume that the jury were warranted in finding that he had a right to be on the elevator and that he was in the exercise of due care at the time of the accident. We do not find it necessary to consider this with care, because in our opinion he failed to make out a case of negligence on the part of the defendants.

The elevator in question ran from the sub-basement of the defendants' store to the sidewalk in Pemberton Square. It consisted of a platform seven feet ten inches square, with an iron post at each corner about six and a half feet high. The top of the elevator well had an iron covering which was raised by these posts as the elevator ascended above the level of the sidewalk, and this covering returned automatically when the elevator descended. The top edge of the elevator well was made of a stone coping seven inches deep, and the sides of the well below the coping, for a distance down the well of ten or fifteen feet, were plastered on metal lathing.

The plaintiff's case was that he had gone to the sub-basement with a basket full of waste paper, and after depositing it there he was returning on the elevator, sitting on his basket with one foot inadvertently over the edge of the elevator, when it was caught in a hole in the plaster just under the stone coping. "The evidence tended to show that the plaintiff was injured by losing the two outside toes of his right foot and a portion of the outside of said foot. No other toes were injured."

No witness had seen this hole before the injury. One Williams examined it for the plaintiff twenty-three days after the accident. His description of it was as follows: "There is a cap of granite that lies level with the sidewalk, about six or eight inches thick, and underneath that capping about the middle of the front of the elevator was a hole which was directly under the cap where the plastering or side of the elevator well had fallen off and leaving a place under the cap and running back; I measured with my finger on the left hand side, it would be about an inch and a half deep and on the right hand side it would be about an inch deep — it was an uneven break. The

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break was five or six inches wide." Two witnesses called by the defendants, who were on the sidewalk when the accident happened and looked to see what was the cause of it, also described this hole. One said: "The only thing I saw was a little hole there under the coving there, or that plate that comes down there, and I should judge it was about as big as your fist." The other: "Say this was the coving, here, your stone coving, and there was a little break, not very large, right underneath, I should say a couple of inches, — I don't know, but somewhere about that; just a little dent of a hole in.

"Q. How deep was it? A. I didn't take particular measurement, but I would take it — just looking at it there — about half an inch, or so; about half an inch, I should say."

The evidence justified a finding that the hole was an old one.

The clearance between the elevator and the sides of the elevator well was about an inch, but there was some vibration in the working of the elevator, especially in case of heavy loads. The plaintiff's witness Williams testified that the "well was rough and there were other breaks in the plastering besides this one; that the sides of the well were scraped, with lines running up on all sides; that there were scratches varying from one fourth to one half inch in depth; that excepting for these holes and scratches the surface of the elevator well was smooth."

The plaintiff relies also on the following testimony given on cross-examination by one Shea, a machinist in charge of the defendants' elevators but not of their elevator wells; namely, that the walls of the well ought to be flush to avoid danger as much as possible, the danger of bundles getting caught which might tear the wrapping, or rip machinery, and if that happened, somebody would probably get hurt.

The plaintiff also relies on the testimony of this witness "that a hole in the side of the elevator eighteen inches long and projecting in under that cap from an inch to an inch and a half, and projecting down four to six inches, would be such a place as he would feel it his duty to report."

We lay aside the last answer of this witness. The witness testified that he did not find a break of that kind, and we find in the bill of exceptions no statement that the break in question was a break of that kind.

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We are of opinion that it would be holding an employer to too high a degree of care if he was held to be negligent in not repairing a break in the plastering of a freight elevator well which is necessarily scratched and banged in the use to which it is put, when that hole at most is five or six inches wide, two inches and a half high, and an inch deep at one side and an inch and a half deep at the other side. We have taken the height of the hole at two and one half inches because one of the defendants' witnesses said it was "as big as your fist." No height was given by the witnesses called by the plaintiff. We are of opinion that it was not a defect. See in this connection *Jennings* v. *Tompkins*, 180 Mass. 302.

So far as there was a danger incident to the walls of the elevator well being covered with plaster in place of boards or metal, that was a danger assumed by the plaintiff as an obvious risk of the employment which he chose to accept.

Exceptions sustained.

JOB MONAGHAN *vs.* GLOBE NEWSPAPER COMPANY.

Norfolk. November 17, 1905. — February 28, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Libel.

In an action for libel, proof that a complaint was entered against the plaintiff charging him with larceny of less than $100 from a certain town, and that a warrant was issued on that complaint, does not prove the truth in substance of a statement published in the defendant's newspaper that the plaintiff had been arrested, that he was accused of taking town money for work he did not do, and that he was placed in custody on a certain evening and soon bailed, that according to the allegations of the complaint the plaintiff received pay for work he did not perform and charged the town and was paid for the use of a team on a certain day when the team was not used by the town, that it is understood that the amount involved is less than $100, and that whether any attempt to name any other date will be made on the part of the government is not stated.

THE following statement of the case is taken from the opinion of the court:

This is an action for publishing the following alleged libel of and concerning the plaintiff:

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"Larceny Charge.

"Job Monaghan Arrested at Wellesley : Accused of Taking Town Money for Work He Did not Do: Formerly Assistant Engineer of Fire Department.

"Wellesley, June 30. — Much sensation has been caused by the arrest of Job Monaghan, a well-known resident and former town official, charged with larceny of the town's money. Monaghan was placed in custody about 8.30 this evening, and was soon bailed.

"According to the allegations of the complainant, Chief of Police Kingsbury, Monaghan received pay for work he did not perform.

"The charges are that Monaghan, during the five or six years he served as an assistant engineer of the town, kept a pair of horses in readiness to attach to hose 3 and to drive that piece of apparatus in response to a fire alarm. If he did not answer on the first alarm, and there was no second, he received remuneration, but not as great as though hose 3 had answered the first call.

"It is alleged that Monaghan charged the town for a hitch of the latter character on March 23 that he did not make, but for which he was paid. The amount involved, it is understood, is less than $100. Whether any attempt to name any other date will be made on the part of the government is not stated.

"Monaghan is a stone mason and resides on Walnut St., near Lower Falls. He is about 45 years old, married, and has always lived in Wellesley. He has been prominent in town affairs and his arrest has aroused expressions of surprise on the part of his friends.

"During Monaghan's service as assistant engineer, which duties he relinquished this year as he failed of re-appointment by the selectmen, his salary was $75.

"The case will come up for trial in the District Court at Dedham on Wednesday."

The answer required proof that the libel was published of and concerning the plaintiff; it then alleges "that the same was made in good faith, without malice, expressed or implied, toward the plaintiff or any one, from reliable information, fully verified, the

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same being published as news matter by it, believing the same to be true." It further alleges the truth of the statements, that it was a fair report of a judicial proceeding, and that within the time required for an answer it offered to publish the following as a retraction:

"Was not Arrested:

"Globe's Report of Suit Against Mr. Monaghan Inaccurate.

"As there appeared in a publication of the Globe Newspaper of July 1, 1902, in an article relative to the charge against Job Monaghan of Wellesley, for larceny and taking money that he did not work for, from the town, the statements that said Monaghan was arrested at Wellesley, that he was placed in custody about 8.30 in the evening and was soon bailed, were not true, the said Monaghan not being arrested but being cited or summoned to appear and answer to the charge of larceny for trial, as the article otherwise states.

"Although nearly a year and a half after the publication, on being informed of the incorrectness of this statement, the Globe immediately offered to publish a retraction or correction of anything that was wrong, but the offer not being accepted by the said Monaghan or his attorney, the Globe now publishes this retraction or correction of the circumstances in connection with Monaghan's trouble," and that this offer was not accepted.

At the trial the defendant rested on the plaintiff's evidence. The plaintiff testified in his own behalf, and read the answers of the defendant to interrogatories filed by the plaintiff giving the circulation of the defendant's paper and stating that the libel was written by one Bentley, "who received his information from the police station or police officials at Wellesley as a news item." It was agreed that the retraction set forth in the answer was duly offered and declined. On cross-examination of the plaintiff the defendant put in the complaint and warrant hereinafter more fully stated.

The plaintiff testified that he was a brick mason and plasterer; that he was connected with the fire department of Wellesley for six years; that he saw the publication complained of; that a great many of his friends spoke to him of it; that it troubled him, and that his business declined in the year following. On cross-examination he testified that he kept a pair of horses in

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readiness as stated in the publication, and that he received more remuneration if his horses were used on the first alarm; that he attended court on a summons without being arrested. The complaint and warrant put in evidence were dated June 28, 1902. The complaint alleged that the plaintiff "did steal money of the value of less than one hundred dollars of the property of the town of Wellesley." The return of arrest on the warrant is dated July 2, 1902. By it the officer states: "I have arrested the within-named defendant, Job Monaghan, and have him before the District Court." The plaintiff testified that July 2 was the date of the hearing which he attended on the summons testified to by him, and that he was summoned in the evening of July 1, that is to say, in the evening of the day on the morning of which the libel was published, and the day after the date of the libellous statement. The plaintiff also testified that the case was appealed from the District Court to the Superior Court, and was disposed of in the latter court a short time before the date of the writ in this action.

The defendant asked for the following rulings:

(1) Upon all the evidence the plaintiff cannot recover.

(2) If the jury believe that the defendant published the statements alleged as a news item, without malice, and that the same are substantially true, their verdict must be for the defendant.

(3) If the jury believe the defendant published the alleged libel without malice, as news matter, and that the same is a fair and impartial report of the facts, they are to regard the same as privileged, and will find a verdict for the defendant.

(4) If the jury find that the offer pleaded by the defendant in its answer was a sufficient offer to retract all that part of the original libel not proved by the defendant to be true, then they shall find a verdict for the defendant, as no actual damage has been pleaded or proved.

(5) If the jury shall find that the offer pleaded by the defendant was not a sufficient offer of retraction, then the same shall not be taken to be an admission against the defendant of the truth of the plaintiff's allegation.

(6) Upon the facts in this case the plaintiff was placed under arrest by the officer June 30, 1902.

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The judge instructed the jury in substance that if the defendant proved the truth of the statements published by it it would be a defence unless the plaintiff proved actual malice, and that in the case at bar there was no evidence of that; also that the proprietor of a newspaper is permitted to publish the fact that a complaint and warrant had been issued and to publish "the facts which actually transpired under those proceedings, but when the paper goes beyond the publication of just those facts, when it undertakes to publish things which do not appear in these papers and in these proceedings, then the fact of the complaint and warrant would not justify the paper for those things which are outside of the complaint and of the warrant. Now, the complaint against this plaintiff is that he did steal money of the value of less than $100, of the property of the town of Wellesley. The complaint is not in terms as stated in the article. That Monaghan charged the town for a hitch of the latter character on March 23d which he did not make, but for which he was paid. The article does not give that which actually appeared in the complaint, and of course you will see that the complaint might be supported by — it is a possibility it might be supported by very many other things than this particular charge that is made in the article alleged to have been libellous. The warrant issued upon that simply recited the fact that it was on complaint this day made on oath before said court for larceny." The judge left it to the jury to say whether the evidence proved the truth of the allegations contained in the article. The fifth ruling asked for was given with this qualification, "that the proof of the offer of retraction has no effect in the case excepting as it may be shown in mitigation of damages. It has no other bearing on the case."

The jury returned a verdict for the plaintiff in the sum of $500.

The defendant took exceptions to the refusal to rule and to the rulings given.

C. T. Gallagher, (*T. E. Grover* with him,) for the defendant.

W. R. Bigelow, for the plaintiff.

LORING, J. [After the foregoing statement of the case.] The rulings were sufficiently favorable to the defendant.

1. The case made out in evidence was not one which called for a ruling that it was enough to prove that the things written

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were in substance true, as laid down in *Conner* v. *Standard Publishing Co.* 183 Mass. 474.

2. The defendant was not entitled to a ruling that the libellous statements were as matter of law proved to have been substantially true. All that was proved to be true was that a complaint had been lodged against the plaintiff, charging him with larceny of less than $100 from the town of Wellesley, and that a warrant had issued on that complaint. The defendant did not prove the truth of the statements (1) that the plaintiff had been arrested; (2) that he was accused of taking town money for work he did not do; (3) that he was placed in custody about 8.30 this evening [i. e. on the evening of June 28] and was soon bailed; (4) that according to the allegations of the complainant (Chief of Police Kingsbury) Monaghan received pay for work he did not perform; (5) that "It is alleged that Monaghan charged the town for a hitch of the latter character on March 23 that he did not make, but for which he was paid. The amount involved, it is understood, is less than $100. Whether any attempt to name any other date will be made on the part of the government is not stated."

3. The statement offered as a retraction was as matter of law not a retraction of what we have already pointed out to have been libellous statements not proved to be true. It is not necessary to consider what would have been the consequences if the statement which the defendant offered to publish had been a retraction.

Exceptions overruled.

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JOSEPH B. MOORS & another *vs.* CHARLES S. BIRD.

Suffolk. November 17, 20, 1905. — February 28, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Sale. Bills of Lading. Contract. Mistake. Payment.

Where a banker advances to an importer the purchase money for goods on drafts under a commercial letter of credit which requires that the goods shall be shipped to this country with bills of lading to the order of the banker, one copy to be sent to the banker direct by vessel or mail, the banker becomes the owner of the goods.

A banker, who has acquired the title to merchandise imported from a foreign country by advancing the purchase money under a letter of credit on drafts accompanied by bills of lading of the merchandise to his order, does not lose this title by indorsing the bills of lading to the importer and permitting the goods to be delivered to him under a trust receipt by which the importer agrees to hold the merchandise in trust or on storage as the property of the banker with liberty to sell and deliver the merchandise to a certain firm on account of the banker and to deliver to the banker the proceeds of any sale of the merchandise, to be applied by the banker in the first place to the payment of any drafts or acceptances under the letter of credit and secondly to the payment of any other indebtedness of the importer to the banker.

An importer of paper stock agreed with a paper manufacturer to sell him imported merchandise for the actual cost of the merchandise to the importer and the sum of one dollar per ton. To enable the importer to carry out this contract, and with the knowledge of the manufacturer, a banker advanced the money to pay for the imported merchandise on drafts under a commercial letter of credit accompanied by bills of lading of the merchandise to the order of the banker, whereby he became the owner of the merchandise. He indorsed the bills of lading to the importer in exchange for trust receipts by which the importer agreed to hold the merchandise in trust or in storage as the property of the banker with liberty to sell and deliver the merchandise to the manufacturer and pay the proceeds to the banker. The arrangements between the importer and the banker were known to the manufacturer, and the terms of the contract between the importer and the manufacturer were known to the banker. Under this contract merchandise was delivered by the importer to the manufacturer who paid what he believed to be the price under the contract directly to the banker. Unknown to the banker and the manufacturer the importer fraudulently had made a secret arrangement with the seller of the merchandise in a foreign country by which the seller added to the invoice price fictitious freight charges greater than the actual freight charges to be paid by the importer. This caused the payments for the merchandise made by the manufacturer to the banker to be greater than they should have been under the terms of the contract between the importer and the manufacturer. In ignorance of the fraud, the banker after deducting the amount of his advances and expenses turned over the balance of the purchase money to the importer, or credited him with it in a settlement of accounts. *Held*, that the merchandise

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delivered by the importer to the manufacturer was sold by its owner, the banker, to the manufacturer under an oral agreement on the terms of the contract between the importer and the manufacturer, that the manufacturer, having paid to the banker the wrongful freight charges in excess of the amount due under that contract, could recover from the banker the amount of such excess as money paid under a mistake of fact, and that the fact that the banker had paid the money to the importer or had credited it to him in a settlement of accounts was no defence.

If a person to whom money is payable asks the person paying the money to pay it to one of his creditors instead of to himself, and this is done, the payment in legal effect is made, not to the creditor who receives the money, but to the debtor at whose request and for whose benefit it is paid, and the creditor who receives the money incurs no obligation to the person from whose hands he receives it.

CONTRACT for $7,000. Writ dated September 15, 1902.

The defendant filed an answer containing a general denial, and the following declaration in set-off:

"The defendant says that he is a manufacturer of paper and the firm of Horace Dutton and Company, hereinafter mentioned, doing business in Boston and in England, were previous to January 1, 1898, and up to the date of the writ dealers in paper stock.

"That previous to the year 1898, the defendant entered into a contract with Horace Dutton and Company, by which Horace Dutton and Company agreed to sell to him paper stock of various kinds used in the business of the defendant, at a price to be determined by adding to the actual price paid by Horace Dutton and Company in the foreign market for such stock, the amount of their office expenses incurred in making such purchases for the defendant, the actual freight, if any, paid by them on merchandise sold to the defendant, and the wharfage, insurance, and banker's commission on such goods, and a sum of one dollar per ton of 2240 pounds. That said merchandise was purchased by Horace Dutton and Company in the foreign market, with the proceeds of drafts drawn under a letter of credit issued by the plaintiffs and that the merchandise so purchased was held by the plaintiffs, either as collateral or as their own property, to secure them for payments made by them in taking up such drafts.

"That such merchandise was delivered by the plaintiffs to Horace Dutton and Company under trust receipts, with authority to sell the same to the defendant for account of the plaintiffs;

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that the merchandise delivered to Horace Dutton and Company under such trust receipts was immediately delivered by them to the defendant, with instructions to pay for the same to the plaintiffs, and accompanied by a bill for the same from the plaintiffs. That the defendant paid for a large amount of merchandise in this manner. That about August, 1900, the defendant discovered that Horace Dutton and Company and the plaintiffs had charged the defendant for such merchandise paid for by him more than was actually due for the same, and that he had therefore paid more than was actually due for the same, believing that the bills were correct, by the sum of $7,000.

"Wherefore, he prays that such overcharge may be set off against the claim of the plaintiffs, if any."

In the Superior Court the case was submitted upon an agreed statement of facts, and that court ordered judgment *pro forma* for the defendant. The plaintiffs appealed.

The agreed facts were as follows:

The plaintiffs, J. B. Moors and Company, are bankers doing business in the city of Boston. The defendant, doing business as F. W. Bird and Son, is a paper manufacturer in Walpole, Massachusetts. The firm of Dutton and Company, at the time of the transactions hereafter described, were importers of paper stock, doing business in Boston. Since about 1888 Dutton and Company have been carrying on business with Bird and Son, selling to the latter paper stock, bought in Europe and imported into this country.

At some time before November 1, 1897, it was agreed between Bird and Son and Dutton and Company that the price to be paid by Bird and Son for all imported merchandise sold to them by Dutton and Company should be the sum of the actual cost of the merchandise to Dutton and Company, the cost of cables and office expenses, agreed to be four per cent of purchase, the bankers' commission, agreed to be one and one quarter per cent, insurance and wharfage, and the sum of one dollar per ton of two thousand pounds.

Dutton and Company had a house in London and a house in Boston. Purchases of merchandise were made by the London house in France, terms, delivered in Boston, freight prepaid; and such merchandise, when delivered to Bird and Son, was

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invoiced to them at a price determined by adding the expenses and other items above set forth to the amount at which the merchandise was invoiced to Dutton and Company by the seller in France. Bird and Son made all payments for such invoices in ignorance of the facts set forth in the next paragraph.

Without the knowledge of Bird and Son or Moors and Company, Dutton and Company made an arrangement with the seller of such merchandise in France, whereby the latter secretly allowed Dutton and Company, for the freight to Boston, the sum of sixteen shillings per ton, to be deducted from the purchase price as shown by the invoice. Dutton and Company then arranged with the carriers for a rate which varied from ten to thirteen shillings per ton. It is agreed, for the purposes of this case, that the difference between sixteen shillings per ton, allowed by the seller in France for freight as aforesaid, and the amount actually paid for freight, amounted, from November 1, 1897, to August 1, 1900, to the sum of $7,000. The amount of this difference on the bills remaining unpaid on August 1, 1900, is hereafter stated.

To enable them to carry on the business of importing paper stock and selling it to Bird and Son and their other customers, Dutton and Company requested and obtained from time to time the issue to them by Moors and Company, of mercantile or commercial letters, all in a similar form hereafter printed. Under these letters of credit drafts were drawn by Dutton and Company upon the London correspondent bankers of Moors and Company and accepted by the correspondent bankers. These drafts were discounted by Dutton and Company and the proceeds used to pay for the merchandise, and the drafts were paid by the correspondent bankers out of funds provided for that purpose by Moors and Company. Accompanying the drafts were invoices made by the seller in France and sworn to before the United States consul, and bills of lading made out to the order of Moors and Company, covering the merchandise purchased, and such invoices and bills of lading were forwarded by mail to Moors and Company and held by them until the arrival of the merchandise in Boston. After such arrival Moors and Company indorsed the bills of lading and delivered them and the consular invoices to Dutton and Company, and at the same time

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took in exchange therefor trust receipts, all in a similar form hereafter printed. Dutton and Company then shipped the merchandise to Bird and Son and, in accordance with the terms of the trust receipts, handed to Moors and Company invoices to Bird and Son of the merchandise so shipped, and Moors and Company sent these invoices to Bird and Son, enclosed in letters. The price named in the invoices was a price fixed by Dutton and Company, believed by Bird and Son to have been fixed in the manner agreed between them.

In pursuance of the foregoing method, payments for the merchandise imported by Dutton and Company and sold to Bird and Son were, in all cases, made directly to Moors and Company.

On or about August 1, 1900, Bird and Son discovered that Dutton and Company were making a profit on the freight charges, in the manner explained above, and immediately notified Dutton and Company and Moors and Company that they should decline to pay for merchandise delivered any more than the amount contracted to be paid by them, and that they should reserve from the amount then due for merchandise already delivered a sufficient sum to cover the overcharges on invoices paid and unpaid.

At this time there were outstanding and unpaid the bills for paper stock sold by Dutton and Company, or Moors and Company, if they are to be regarded as sellers, to Bird and Son under the method of doing business above described, amounting to $19,846.98.

The amount of the difference between sixteen shillings per ton and the amount of freight actually paid by Horace Dutton and Company on the above bills was $264.07.

All bills for merchandise before those outstanding had been paid in full by Bird and Son to Moors and Company, and had been credited to Dutton and Company on their account with Moors and Company.

On August 20, 1900, Bird and Son paid, on account of the bills mentioned above, $5,000, and on September 14, 1900, the further sum of $7,846.98, retaining, and stating that they would retain, the sum of $7,000, which they claimed by reason of the facts above set forth, and which they have retained.

Until the notice given by Bird and Son in August, 1900,

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Moors and Company had no knowledge of the agreement between Bird and Son and Dutton and Company, as to the price to be paid by the former for imported merchandise sold by the latter. The allowance of sixteen shillings per ton above mentioned for freight, and the deduction thereof from the invoice price to Dutton and Company, did not appear in any of the papers, accounts or dealings of which Moors and Company or Bird and Son had knowledge.

Dutton and Company imported, under letters of credit issued by Moors and Company, merchandise other than that sold to Bird and Son, and the latter was but a small portion of the entire amount so imported.

The business between Bird and Son and Dutton and Company was entirely carried on through Moors and Company as bankers, and Bird and Son were entirely familiar with the nature of Moors and Company's relation to such business and with the course of dealings between Moors and Company and Dutton and Company.

Before 1894 Dutton and Company had become indebted to Bird and Son. On December 29, 1899, at the request of Dutton and Company and of Bird and Son, the plaintiffs, Moors and Company, examined the condition of their entire account with Dutton and Company, and found that the unpaid invoices payable to them from Bird and Son, and from the other customers of Dutton and Company, together with certain merchandise on hand, amounted to more than enough, when collected, by the sum of $4,080.81, to provide funds to meet all the drafts accepted by their correspondents in London under outstanding letters of credit, issued to Dutton and Company. Of the invoices then payable to Moors and Company, on the account of Dutton and Company, there were $33,414.93 due from Bird and Son, which Moors and Company considered and assumed to be good, without deduction. Relying upon this showing of the account, Moors and Company on the following day, at the request of Dutton and Company and of Bird and Son, paid over to the latter the sum of $3,858.27, in liquidation of an indebtedness of Dutton and Company to Bird and Son, incurred before 1894.

For the purposes of this case, it is agreed that on December 29, 1899, the amount of the difference in freight charges be-

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tween sixteen shillings per ton and the amount actually paid by Dutton and Company, in the manner aforesaid, was in excess of $4,080.81; also that taking the amount shown on Moors and Company's account with Dutton and Company, as due from Bird and Son to be good for its face, Dutton and Company, on August 1, 1900, owed Moors and Company $324,52, and on September 15, 1902, the date of the writ, $4,075.94.

Between November 1, 1897, and August 1, 1900, Moors and Company, relying upon the state of the account with Dutton and Company, as shown on Moors and Company's books, made payments of cash to Dutton and Company from time to time on general account exceeding in the aggregate the sum of $7,000; and after August 1, 1900, and before the date of the writ, made payments to Dutton and Company on general account at various times aggregating the sum of $4,149.26. After August 1, 1900, and before the date of the writ, Dutton and Company closed their Boston office and ceased to do business.

The following is one of the letters of credit:

"J. B. Moors & Co.
"Letter of Credit.

"No. 1423k.

"Boston, Nov. 29th, 1897.

"Messrs. Horace Dutton & Co., Boston, Mass., & London, Eng.

"Dear Sirs: — We hereby authorize you or such Parties as you may direct to value on Messrs. Kleinwort, Sons & Co. of London, at four months' date for any sum or sums not exceeding in all three thousand pounds sterling, say, £3,000 sterling, for account of yourselves.

"Drafts, with advice thereof to Messrs. Kleinwort, Sons & Co. to be drawn in Europe, and negotiated prior to May 1st, 1898, for the invoice cost of merchandise to be shipped to the Port of Boston, New York, or Philadelphia, in the United States, or Montreal, Canada, and to be accompanied by Consular Invoice and Bills of Lading to our order, one copy to be sent us direct by vessel or mail.

"Proper insurance to be effected in Boston, by yourselves.

"We hereby agree with the drawers, indorsers and bona fide holders of Bills drawn under and in compliance with the terms

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of this credit that the same shall be duly honored upon presentation at the office of Messrs. Kleinwort, Sons & Co. in London.

"Please sign Bills as drawn under Credit No. 1423k, dated Boston, Nov. 29th, 1897.

"Yours very respectfully,

"J. B. Moors & Co."

The following is one of the trust receipts:

"82

20-9-24-03

Amount	No. of Credit	Due in London	Due in Boston
£59 9/3	2681k	April 9, 1901	Mar. 25, 1901

"Boston, Dec. 18, 1900.

"Received from J. Moors & Co., Boston, acting on behalf of Kleinwort, Sons & Co., London, and themselves, the following-described Merchandise belonging to them, specified in Bill of Lading, per S. S. Michigan, dated Liverpool, Dec. 5, 1900, viz: —

(B) 1/152 One hundred fifty-two Bales Waste Paper, which we hereby agree to hold in trust or on storage as their property with proper insurance which shall be paid to them in case of loss, but with liberty to sell and deliver said Merchandise to F. W. Bird & Son, for account of said J. B. Moors & Co., and we further hereby agree to deliver to the said J. B. Moors & Co., or Kleinwort, Sons & Co., the proceeds of any sale of said Merchandise, (whether in notes or cash, or other Merchandise,) the same to be applied by them, in the first place toward the payment of any drafts or acceptances under Letter of Credit No. 2681k issued by them for our account, and secondly to the payment of any other indebtedness from us to the said J. B. Moors & Co., with the further understanding that neither the said J. B. Moors & Co., nor said Kleinwort, Sons & Co., are to be chargeable with any expense incurred on said Merchandise: — the intention of this agreement being to protect and preserve unimpaired the title and ownership of said J. B. Moors & Co., or said Kleinwort, Sons & Co., in said Merchandise and the proceeds thereof.

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"With the understanding that the merchandise is to be billed by us, but bill made payable to J. B. Moors & Co., we further hereby agreeing to forthwith hand J. B. Moors & Co. said bill.

"Horace Dutton & Co."

The following, taken from the plaintiffs' brief, is the contention of the plaintiffs referred to in the last paragraph of the opinion:

"If the defendant is entitled to reimburse himself for the payments which he contends that he made under a mistake of fact, the plaintiffs must, on similar reasoning, be entitled to recover the sum of $3858.27, with interest, as claimed in the second count of their declaration. This sum was paid by the plaintiffs to the defendant, at the request of the defendant and of Dutton and Company under a mistake of fact similar to the mistake under which the defendant contends that his payments to the plaintiffs were made. When they made the payment of $3858.27, the plaintiffs believed that the amounts theretofore paid to them by the defendant were correct, and they relied upon the state of the account, as determined by these payments, when they made the payment of $3858.27." See page 405.

G. D. Burrage (*N. B. Vanderhoof* with him,) for the plaintiffs.

C. K. Cobb, for the defendant.

LORING, J. It is settled in this Commonwealth that a banker gets the title to goods bought under such a commercial letter of credit as that now in question, *Moors* v. *Drury*, 186 Mass. 424, and cases there cited, and that that title is not lost by a delivery of the goods under such a trust receipt as that which we have here. *Moors* v. *Wyman*, 146 Mass. 60.

The delivery by Dutton and Company of the paper stock in question to the defendant created a sale by the plaintiffs to the defendant on the terms of the original contract between Dutton and Company and the defendant, as in *Plunger Elevator Co.* v. *Day*, 184 Mass. 130, and *American Electrical Works* v. *New England Electric Railroad Construction Co.* 186 Mass. 546.

The defendant paid to the plaintiffs more than the amount due under that contract when he paid the alleged freight in place of the true freight. And the money so paid is without question money paid under a mistake of fact.

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These payments made by the defendant were in legal effect payments to the plaintiffs and not payments in legal effect to Dutton and Company made at their request to the plaintiffs, as was the case in *Merchants' Ins. Co.* v. *Abbott*, 131 Mass. 397.

The defendant's counsel has contended with much earnestness that this overpayment can be recovered back from the plaintiffs because Dutton and Company acted as their (the plaintiffs') agents in selling the goods to him, and Dutton and Company's fraud is for that reason in legal effect the fraud of the plaintiffs. However that may be in a case where the importer holding the goods of the banker under a trust receipt sells to a stranger, it is at least doubtful whether the importer acts as the agent of the banker in delivering goods which have been bought under a letter of credit issued to the importer to enable the importer to carry out a previous contract by which the importer was to import goods for his customer and the customer takes the goods in pursuance of that contract, knowing all the relations of the several parties.

We are however of opinion that the second ground is well taken on which the defendant contends that he is entitled to recover back from these plaintiffs the money paid by him under this mistake of fact. As we have said, the overpayments were made to the plaintiffs. The defendant has a right to have them back from the plaintiffs unless he has lost that right by the fact that the plaintiffs have settled their account with Dutton and Company, and have paid to them these and all other sums due to them.

It is settled in England that where money is received under a mistake of fact it is no defence that the money has been paid over to another unless the defendant who received the money was a mere agent of that other person, that is to say, unless the payment was in legal effect a payment to the other person. *Newall* v. *Tomlinson*, L. R. 6 C. P. 405. *Continental Caoutchouc Co.* v. *Kleinwort*, 8 Com. Cas. 277; *S. C.* on appeal, 9 Com. Cas. 240. See also in that connection *Durrant* v. *Ecclesiastical Commissioners*, 6 Q. B. D. 234. There are similar decisions in Rhode Island and Missouri; *Phetteplace* v. *Bucklin*, 18 R. I. 297; *Koontz* v. *Central National Bank*, 51 Mo. 275; and the law seems to be the same in New York; *Kingston Bank* v. *Eltinge*, 40 N. Y. 391; *Corn*

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Exchange Bank v. *Nassau Bank*, 91 N. Y. 74. The person who receives money under a mistake of fact must pay it back in spite of the fact that he has paid it over to one who would have been entitled to it had the money been what it was supposed to be and that payment over was made in ignorance of the mistake under which the money was paid, provided that, as between the person to whom the payment was made and the person to whom he paid it over, the person to whom the payment was made had a right, in case the state of the accounts between them required it, to keep the money in repayment of advances made, for example, to the other person. In such a case the windfall which came from receiving the money paid under a mistake of fact is, in part at least, his windfall, and he must give it back although in fact all paid over, because the state of accounts did not in fact give him a right to any of it. The test is the right to keep the money if the state of the account required it. The actual state of the account is of no consequence.

In the case at bar the money paid by the defendant to the plaintiffs was the money of the plaintiffs. It is not even money received as the money of Dutton and Company on which the plaintiffs had a lien, as was the case in *Newall* v. *Tomlinson* and *Continental Caoutchouc Co.* v. *Kleinwort*, *ubi supra*. All that Dutton and Company had was a contract right to the balance of account after the plaintiffs had been paid all due to them under the letters of credit.

For these reasons we are of opinion that the defendant has a right to recoup the $7,000 of previous overpayments.

We are also of opinion that the plaintiffs have no right to reimburse themselves for the payment of the $3,858.27. That was in legal effect a payment to Dutton and Company and not to the defendant, and comes within *Merchants' Ins. Co.* v. *Abbott*, 131 Mass. 397.

Judgment for the defendant affirmed.

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A. B. BOTKIN *vs.* JACOB W. MILLER & others.

Suffolk. November 20, 1905. — February 28, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Practice, Civil, Exceptions. *Trespass. Evidence. Damages.*

Where a bill of exceptions does not state that it contains all the material evidence and where the charge of the presiding judge is made a part of the bill of exceptions, this court may have recourse to the charge of the judge to obtain material facts not otherwise stated.

In an action by a man of the Jewish faith, the proprietor of a barber's shop, against several persons also of the Jewish faith for gathering with others in front of the plaintiff's shop on a certain evening, ordering him to close his shop, and on his refusing to do so threatening him, throwing missiles into his shop and preventing customers from entering, whereby it was alleged that the business of the plaintiff was injured and finally destroyed, the defendants testified that as they were returning to their homes from worship they found a crowd opposite the plaintiff's shop and that they took no part in the disturbance. The defendants, against the objection and exception of the plaintiff, were allowed to show that the day in question was kept by the so called Orthodox Jews as a holiday on which no business was done by Orthodox Jews. *Held,* that the evidence was competent in connection with the testimony of the defendants mentioned above to explain, if the defendants' story was true, the fact that they found the crowd around the plaintiff's shop, and also was competent as an explanation of the plaintiff's loss of business from a cause not arising from the acts of trespass.

In an action by a man of the Jewish faith, the proprietor of a barber's shop, against several persons also of the Jewish faith for gathering with others in front of the plaintiff's shop on a certain evening, ordering him to close his shop, and on his refusing to do so threatening him, throwing missiles into his shop and preventing customers from entering, whereby it was alleged that the business of the plaintiff was injured and finally destroyed, there was evidence, held to have been admitted properly, that the day in question was kept by the so called Orthodox Jews as a holiday on which no business was done by Orthodox Jews. It appeared that the disturbance did not last more than one hour and that after that the shop was kept open during the remainder of the evening, and there was no evidence from any customer that he ceased to patronize the shop because of fear that the disturbance would be repeated. The presiding judge instructed the jury that if they found that the defendants participated in any acts of violence or in any trespass upon the shop, the plaintiff might recover such damages as the defendants actually inflicted upon the premises and such loss of custom on the night of the disturbance as they might find that the plaintiff had sustained by any interference with his business, but instructed them to disregard any evidence of loss of business after the night of the disturbance as there was "no natural connection" between such loss and the disturbance of that evening. *Held,* that the instructions were correct; that the evidence did not go far enough to show that the disturbance was the cause of the

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plaintiff's subsequent loss of business, it being at least as likely that the loss occurred from his customers of the Jewish faith leaving him for keeping his shop open on a day when no business is done by Orthodox Jews.

TORT against the defendants hereafter named. Writ dated September 21, 1901.

The declaration as amended was as follows:

"And the plaintiff says that on or about the twelfth day of December last, he was proprietor of a barber shop at 151 Chelsea Street in that part of Boston known as East Boston, in which he conducted the business of a barber; and that, on or about 7.30 o'clock in the afternoon of said day, the defendants gathered in front of said shop and demanded him to close said shop and discontinue and stop doing any business; that he refused to comply with their demands, and that, thereupon, the defendants called upon a large number of people who were standing in the street outside of and in front of said shop, directing them to close said shop by force, if necessary; that the defendants and the people in the street, standing in front of said shop, prevented customers from entering said shop for the purpose of availing themselves of the services of the plaintiff and his employees; and, that the defendants, or those standing outside of said shop, instigated by said defendants, did prevent customers from entering said shop to avail themselves of the services of the plaintiff and his employees; and that the defendants in other ways incited those standing outside of said shop to lawless acts, and drove from said shop those customers who had already entered it for the purpose of availing themselves of the services of the plaintiff and his employees, and by reason of the aforesaid acts of said defendants the business of the plaintiff was damaged and greatly injured which damage and injury has continued until this day and said business has thereby been destroyed."

In the Superior Court the case was tried before *Fox*, J.

The following statement of the case is taken from the opinion of the court:

The declaration in this case is in substance a declaration for trespass *quare clausum fregit* and for an interruption to the business of the plaintiff. There were four defendants: Jacob W. Miller, Louis Miller, Abraham Eskin and A. Zaplan. At the trial there was evidence introduced by the plaintiff that he

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carried on the business of a barber at a shop in East Boston, and that at seven o'clock on the evening of September 4, 1901, the defendants and "several hundred others" gathered in front of the plaintiff's shop, in the plaintiff's absence; that the defendant Zaplan went into the shop and into the tenement of the plaintiff over the shop, looking for the plaintiff, and while in the tenement said "they were going to lynch him"; that the defendant Miller then called out to the crowd, "Smash the premises; I will pay the damages," and that all the defendants urged the crowd "to close up the shop." The plaintiff also showed that "missiles such as mud, banana stalks, peels, a brickbat, were thrown in the shop." The police were called and the crowd was dispersed about eight o'clock. The plaintiff further introduced evidence that he had carried on the business of a barber, with two or more assistants, at the shop for six years, and that his profits were $30 and more a week. It appeared that the shop remained open on the evening in question until midnight, and was open thereafter until the plaintiff moved away; and that from the evening in question the business of the plaintiff declined until in about six weeks he moved away from lack of customers. It is stated in the bill of exceptions as an admitted fact that the plaintiff was "a naturalized citizen of the Jewish faith." It is also stated that: "The defendant is a naturalized citizen of the Jewish faith. Both the plaintiff and the defendant had been friends until about two years before the event stated in the declaration, when some difference had occurred." We do not know whether this statement was meant to apply to all four defendants, or, if not to all four, to which of the four. It also appeared that the plaintiff "had many customers of the Jewish faith, as well as others prior to the riot."

The defendants were allowed to introduce in evidence the fact that the day in question, September 14, 1901, "was kept as a holiday by the so called Orthodox Jews, and, on that day, no business was done by Orthodox Jews, although it was stated that Jews, of reputable standing, in Boston and East Boston, kept open store and business on that day." To this the plaintiff took an exception.

The presiding judge instructed the jury to disregard the allegation of the declaration "that by reason of the aforesaid acts,

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the business of the plaintiff was damaged and greatly injured, which damage and injury has continued until this day, and said business has thereby been destroyed," on the ground "that there is nothing in the evidence which would indicate any probable connection between the acts on September 14 and subsequent loss of business, if there was any. And I perhaps may illustrate what my meaning is. Supposing I, being a strict observer of the Lord's day, should find you, Mr. Foreman, selling newspapers upon that day, and I should go into your shop and by various foolish acts try to stop you in the sale upon that day; and supposing others of your neighbors, like myself being inclined to a strict observance of the day, should express their disapproval of your conduct in another way, that is, by abstaining from custom, by refusing to buy from you, either on week days or on Sunday; now any loss of custom from them, or by their acts couldn't be imputed to me, in the absence of any evidence that I had gone around among your customers urging them not to buy from you. The only allegation here, as I say, relates to acts for this day.

"There is no evidence from any customer that he ceased to trade or to do business in this shop, because of fear that this disturbance of that night would be repeated, and, therefore, as I say, I instruct you that you should disregard any evidence of loss of business after this day, because there is no natural connection between them and the disturbance of that evening." As to the damages, the judge told the jury that "If you find that these defendants participated in any acts of violence or any trespass upon this store, the damage should be such damage as they actually inflicted upon the premises, such loss of custom on that night as you find the plaintiff may have sustained by any interference with the business; and if you find that the acts for which the defendants are responsible were of such a character as to amount to an indignity upon the plaintiff, to injure his feelings, you have a right to take that into account."

The plaintiff conceded that no case had been made out against Eskin, and the jury, under the direction of the judge, found a verdict in his favor. The other verdict was as follows: "The jury find for the plaintiff and assess damages in the sum of Three Dollars as against Jacob W. Miller, Louis Miller and A. Zaplan."

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The case is here on the plaintiff's exceptions.

H. Dunham, (*J. W. Sherman* with him,) for the plaintiff.

B. G. Davis, for the defendants.

LORING, J. [After the foregoing statement of the case.] The bill of exceptions is very meagre, and there is no statement in it that it contains all the material evidence. Under these circumstances it is proper to have recourse to the charge of the presiding judge, which is made part of the bill of exceptions, in order to understand the case before the court.

In his charge the presiding judge, after telling the jury that the loss of business was too remote, proceeded as follows: "Now, so far as the disturbance of that evening is concerned, the plaintiff is quite right in saying that if the defendants took part in that disturbance, if there was a disturbance and the defendants took part in it, it is immaterial what their motive was, whether it was a religious motive or what it was; that no body of men have a right by force to impose their views upon any other body of men, by compelling them to close their shops. And if these defendants, or any of them, took part in acts of violence and acts of trespass upon that night, they are responsible. And that is the question for you to consider, whether they did or whether they did not.

"It is contended on the part of the plaintiff that there is evidence tending, if believed, to show that the defendants, or some of them, made use of incendiary language on that night, and that various missiles were thrown into the open door of that shop, such as banana skins and lumps of mud, and I think a brickbat; that various people went into the shop and jostled the barbers while engaged in their business. It is not contended, and I do not understand that there is any evidence that there was any very great material damage done to the furniture, fittings of the shop. I do not understand that it is claimed that any glass, for instance, was broken or that any furniture was broken; and it appears that the shop did, in fact, keep open that night until the usual hour, and that it was opened on succeeding days. There is no evidence that if any threats of violence were made against the proprietor of that shop he was so far intimidated by them as to abandon his shop and refuse because of fear to keep it open on subsequent dates. The evidence offered on the part of the policemen who were called there is that they found a gathering

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of women and children upon the sidewalk nearest the shop; that they found a gathering of men upon the opposite sidewalk or in the street; that they saw no evidence of a disturbance inside of the shop, and I think they say they saw no evidence of violent acts or violent speech outside the shop; that they ordered the group to disperse and it dispersed, and then the officers went home. The evidence offered upon the part of the defendants is that they were returning from their place of worship, through that street, one of them lived across the street; that they saw this gathering; that they saw no violence and that they took part in no disturbance. Now, gentlemen, it is obvious in this case that there is a considerable conflict in the testimony, and it is for you to resolve that conflict."

1. In our opinion, the evidence admitted against the objection and under the exception of the plaintiff was competent (first) on the question of liability, and (second) on the question of damage. It was competent in connection with the defendants' story that they found the crowd opposite the plaintiff's shop as they were returning to their homes from worship, and that they took no part in any disturbance. The evidence explained the crowd's being around the plaintiff's shop, if the defendants' story was true. We think it competent also on the question of damages, as an explanation of the plaintiff's loss of business.

2. The ruling of the judge as to loss of business was in our opinion correct. The plaintiff did not go far enough to show that this disturbance was the cause of his loss of business. It lasted not more than an hour; it did not in fact cause the shop to be closed that night, and "there is no evidence from any customer that he ceased to trade or to do business in this shop, because of fear that this disturbance of that night would be repeated." See in this connection *Zinn* v. *Rice*, 161 Mass. 571. On the evidence in the case it is at least as likely that the loss of business came from his customers of the Jewish faith leaving him for keeping open shop on a day when no business is done by Orthodox Jews. See *Crowell* v. *Moley*, 188 Mass. 116.

We find nothing in the other cases cited by the plaintiff to the contrary. *Marsh* v. *Billings*, 7 Cush. 322. *Carew* v. *Rutherford*, 106 Mass. 1. *Morasse* v. *Brochu*, 151 Mass. 567.

Exceptions overruled.

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GRANVILLE MORSE *vs.* FRATERNAL ACCIDENT ASSOCIATION OF AMERICA.

Norfolk. November 21, 1905. — February 28, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Insurance, Accident. *Fraternal Beneficiary Corporation*. *Practice, Civil*, Agreed statement of facts.

A provision in an accident insurance certificate issued by a fraternal beneficiary association, "that if the insured is injured while engaged temporarily or otherwise in any occupation or exposure classed by this association as more hazardous than that here given, his insurance and weekly indemnity shall only be so much as the premium paid by him will purchase at the rate fixed for such increased hazard," refers only to the classification of risks in force at the time the certificate was issued, and gives the association no right by a new classification of occupations to change the amount of insurance to which a member is entitled.

In an action on a certificate issued to the plaintiff's intestate by a fraternal beneficiary association insuring against accident, it appeared that the certificate contained a provision, "that if the insured is injured while engaged temporarily or otherwise in any occupation or exposure classed by this association as more hazardous than that here given, his insurance and weekly indemnity shall only be so much as the premium paid by him will purchase at the rate fixed for such increased hazard," that the plaintiff's intestate when the certificate was issued to him was a stage driver, an occupation which belonged to a class of risks entitling the plaintiff to recover $1,250 on the certificate, that later the plaintiff's intestate ceased to be a stage driver and became a passenger brakeman on a railroad, that he notified the defendant's secretary of the change, and received a letter from the defendant's secretary and treasurer informing him that as a passenger brakeman he was entitled to the same amount of insurance as before, that several years later the defendant adopted a new classification "of occupations and exposures, to be used as the manual or classifications of occupations and exposures of this association for all members now insured or to be hereafter insured in this association," that by the new classification a passenger brakeman was put in a class of greater risk and, if the provision applied to the certificate of the plaintiff's intestate, the amount which the plaintiff could recover was reduced to $250, that the defendant's secretary and treasurer had written and mailed a letter addressed to the intestate notifying him of the change and requesting that his certificate be returned to the defendant for rewriting so that it might conform to the new classification. It did not appear that this letter ever was received by the intestate, who did not return his certificate and continued to pay the same assessments and dues as before. The certificate contained a provision under which the defendant could cancel it at any time on making certain payments to the holder. *Held*, that the provision of the certificate above quoted must be construed as referring to the classification in force at the time the certificate was issued, and gave the defendant no right by a subsequent change of classification to reduce the amount of insurance of the plaintiff's intestate; that, even if it had appeared that the defendant's letter

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of notification of the change of classification had been received by the plaintiff's intestate, it could be found in spite of his failure to answer the letter that he did not assent to the change; and that the plaintiff was entitled to recover the full amount of the insurance.

On an agreed statement of facts without the power to draw inferences the court cannot infer from the stated fact that a letter was written and mailed that it was received by the person to whom it was addressed.

SHELDON, J. In this action the plaintiff seeks to recover the sum of $1,250 on an accident insurance certificate issued to his intestate Elmer L. Morse by the defendant. The case comes before us upon the defendant's appeal from a judgment of the Superior Court in favor of the plaintiff upon an agreed statement of facts.

The intestate took his certificate and became a member of the defendant association on June 15, 1888. He was then a stage driver, and was insured as a member of class 5, according to the defendant's classification then in force; and by the certificate issued to him by the defendant on that date, the defendant agreed to pay to his executors or administrators the sum of $1,250 in the event of his death from the injuries insured against, "except that if the insured is injured while engaged temporarily or otherwise in any occupation or exposure classed by this association as more hazardous than that here given, his insurance and weekly indemnity shall only be so much as the premium paid by him will purchase at the rate fixed for such increased hazard." The policy also provided that the certificate holder should be bound by the rules and regulations of the association.

In May, 1891, the intestate ceased to be a stage driver and became a passenger brakeman on a railroad. At this time, by the defendant's classification of occupations and risks, a passenger brakeman was included in the same class as a stage driver. On November 9, 1891, the intestate wrote a letter to the defendant's secretary and treasurer, stating that he had become a passenger brakeman, and inquiring how that would affect his insurance; to which, on the eleventh day of the same month, the secretary and treasurer answered by a letter stating that a passenger brakeman was entitled to the same amount of insurance, $1,250, that the intestate had been holding, with the same weekly indemnity for disabling injuries received in that occupation.

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On January 17, 1896, the defendant, at a meeting duly called, adopted a new classification of "occupations and exposures, to be used as the manual or classifications of occupations and exposures of this association for all members now insured or to be hereafter insured in this association." By this new classification, passenger brakemen were included in class 8, and the amount of insurance payable to them was reduced to $250. On February 7, 1896, the defendant's secretary and treasurer wrote and mailed to the intestate a letter notifying him of this change, and requesting that his policy be returned to the defendant for rewriting so that it might conform to the new classification. It does not appear by the agreed facts whether the intestate received the letter or not; nor does the statement authorize the court to draw any inferences from the facts stated. The intestate continued to pay the same assessments and dues as before, and these were the same in amount that they had previously been. After the action was brought, the defendant's counsel tendered to the plaintiff's counsel the sum of $287, apparently being the reduced amount of insurance with interest and costs.

The question involved is whether the amount of the intestate's insurance was cut down by the change in the classification made in 1896, so that thereafter he was insured for only $250 instead of $1,250, as stated in the policy.

If the original contract had provided that the defendant might make any alteration in its rules, there is no doubt that both the plaintiff and his intestate would have been bound by the change which was made. *Pain* v. *Société St. Jean Baptiste*, 172 Mass. 319. On the other hand, if the policy here in question had provided absolutely for the payment of a fixed sum to the plaintiff, without reference to the character of his occupation, there is no doubt that the defendant could not, by such action as it has taken, cut down its liability to a smaller sum. *Newhall* v. *American Legion of Honor*, 181 Mass. 111. But this policy is not in terms made subject to any future alteration that the defendant might make in its rules; and on the other hand it contains the express stipulation that for any injury occurring while the insured is engaged in any occupation classed by the defendant as more hazardous than that mentioned in the policy, he shall be entitled only to a reduced amount of insurance.

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The real question accordingly is whether this last stipulation shall be taken to refer only to the classification in force at the time of issuing the policy or to include any new classification that may from time to time be adopted by the defendant. Manifestly, the latter construction, if adopted, would, under the language of this policy, leave the plaintiff in a position where his rights could not be enlarged, but might be very greatly diminished, if not wholly taken away by the mere action of the defendant. The payments to be made by the insured would remain unchanged; but the amounts to be paid by the insurer would be capable of reduction to any extent from time to time. In the case at bar, the change made by the defendant would have the effect to reduce the sum to be paid upon the death of the insured to one fifth of the amount specified in the policy. On the other hand, if this were the intention of the parties, it is easy to say so in the policy. We do not think that the construction contended for by the defendant would be a reasonable one, though we are aware that it seems to have prevailed in Pennsylvania in a case which turned largely upon the construction of the charter of the association. *St. Patrick's Male Beneficial Society* v. *McVey*, 92 Penn. St. 510. We are of opinion that by the proper construction of this policy the stipulation as to the defendant's classification of occupations and the agreement of the certificate holder to be bound by the defendant's rules and regulations must be taken to refer to the classification and to the rules in force at the time that the policy was issued.

But the defendant contends that the insured must be taken to have assented to this reduction because although notified by the association of the change which had been made in the classification and of the effect which this change would have upon his insurance, he made no complaint and expressed no dissatisfaction; and the defendant relies on *Fox* v. *Masons' Fraternal Accident Assoc.* 96 Wis. 390. But there the defendant's letter was written in answer to an inquiry of the insured, and there was no question that he had received it. In this case the agreed facts do not show that he received the notice; and although they do contain enough to warrant the court in drawing such an inference if it were at liberty to do so,

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yet in the absence of any provision to that effect, the court is not at liberty to infer the existence of any further essential facts which are not as matter of law necessarily to be inferred, but is confined to the consideration of the facts to which the parties have agreed. *Mayhew* v. *Durfee*, 138 Mass. 584. *Collins* v. *Waltham*, 151 Mass. 196, 197. But even if the plaintiff's intestate had received the notice, we do not think his assent to the action taken could be conclusively inferred. He did not expressly assent to it; he did not forward his policy to have it rewritten, as requested by the notice; the dues and assessments which he afterwards paid were the same that he was required to pay under his original agreement. The rights of the defendant were sufficiently protected by the stipulation that it might at any time cancel the policy.*

The tender made by the defendant was for an insufficient amount, and we need not consider whether it was otherwise good.

The judgment for the plaintiff for the total amount named in the policy must be affirmed; and it is

So ordered.

M. H. Browne, (*J. M. Browne* with him,) for the defendant.

E. J. Whitaker, for the plaintiff.

DAVID CAHILL *vs.* BOSTON AND MAINE RAILROAD.

Middlesex. November 22, 1905. — February 28, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Negligence, Employer's liability.

In an action against a railroad company by a workman employed in its freight house for personal injuries, it appeared that it was a part of the plaintiff's duty to open cars for unloading and to place a skid as a bridge between the car to be unloaded and the freight house, that in seeking a skid for this purpose

* The provision of the certificate referred to was as follows: "The association may cancel this certificate at any time by returning to the certificate holder any and all moneys paid by the certificate holder to the association, less a pro-rata share for the time it has been in force."

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he went into the freight house and took one that was leaning against a row of cotton bales, and as he took it away the bales fell over on him, causing the injuries. It was contended by the plaintiff that the defendant's foreman was negligent in allowing the bales to be placed on end leaning against each other without a bulkhead of horizontal bales to support them, but there was nothing to show who directed that the bales should be placed where they were or how long they had been in the position in which they were when they fell. *Held*, that the plaintiff, in taking the skid away without looking to see how it stood against the bales and what effect its removal would have, was not in the exercise of due care, and further, that, assuming that for the foreman knowingly to have left the bales in such a position that the removal of the skid might cause them to fall would have been evidence of negligence, there was no evidence that the foreman knew of the position of the bales, so that a verdict for the defendant was ordered properly.

MORTON, J. This is an action of tort for personal injuries sustained by the plaintiff while in the defendant's employ. The plaintiff was employed in and about the defendant's freight house, and it was a part of his duty to open cars that were loaded, and to take a skid from the freight house, and place it so that it formed a bridge between the car and the freight house across which men took the freight from the car into the freight house. On the morning of the accident the plaintiff opened a car, and went into the freight house to get a skid. He took one that was leaning up against a row of cotton bales, and as he took it away the bales fell over on to him causing the injuries complained of. He testified that he took the skid as he usually did. The plaintiff contends that there was evidence of negligence on the part of the defendant and its superintendent in respect to the way in which the bales of cotton were placed. At the close of the evidence the judge ruled at the request of the defendant that the plaintiff was not entitled to recover and directed a verdict for the defendant. The case is here on exceptions by the plaintiff to the ruling thus made and the verdict thus directed.

We think that the ruling was right. It is possible that some of the reasons given for it may not have been entirely sound, but we think that the ruling itself was correct. There was no evidence of negligence on the part of the defendant. The bales of cotton as they were piled or stored in the freight house did not constitute a part of the ways, works or machinery. *Lynch* v. *Allyn*, 160 Mass. 248, 252 *et seq.* It is not contended that they did. The negligence relied on is that of a superintendent, or foreman, one Baker. There was evidence tending to show

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that the usual way of placing or piling bales in the freight house was to stand them up in a tier against a bulkhead, as it was called, which consisted of three bales of cotton, two laid down on the floor and the other on top of them. And the negligence complained of is that the foreman either directed or allowed the bales that fell to be placed on end leaning against each other without a bulkhead to support them, or that he suffered them to stand in that way after they had been so placed without his direction. It is difficult to see how, if we understand the situation correctly, a bulkhead would of itself necessarily prevent the bales from falling. They might have been so placed against each other that even with a bulkhead the removal of the skid would cause them to fall. The plaintiff took the skid away without making any examination to see if it could be done safely. He knew that freight was liable to be moved in the freight house by other employees and by teamsters. And, though acting within the scope of his duty in doing what he did, he acted of his own motion and not from any direction or assurance given by the foreman or any one else. Ordinary prudence would seem to have required that he should not take the skid away without looking to see how it stood against the bales and what effect its removal would have upon the bales against which it was leaning. Further, there was nothing to show who directed the bales to be placed where they were, or how long they had been in the position in which they were. For aught that appears their position might have been changed by other employees or by teamsters coming to the freight house for freight, without any knowledge on the part of the foreman and under such circumstances that no negligence could be fairly imputed to him for suffering them to remain in the position in which they were, even if we assume that for the foreman knowingly to have left the bales in such a position that the removal of the skid would or might cause them to fall could have been found to be negligence on his part. See *Fitzgerald* v. *Boston & Albany Railroad*, 156 Mass. 293; *Burns* v. *Washburn*, 160 Mass. 457; *Thompson* v. *Norman Paper Co.* 169 Mass. 416.

Exceptions overruled.

H. N. Allin, for the plaintiff.

F. N. Wier, (*L. T. Trull* with him,) for the defendant.

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CHARLES MOORE & another *vs.* GEORGE E. JACOBS & others.

Middlesex. November 22, 1905. — February 28, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Mechanic's Lien.

On a petition to enforce a mechanic's lien, where it is admitted that the petitioner is entitled to enforce his lien and the only question open is whether certain notes given to the petitioner by the person for whom the work was performed, which were not received in payment, were so dealt with by the petitioner that he received benefit from them and therefore that the respondent should be credited with the amount so received by the petitioner, if it appears that the petitioner negotiated the notes and did not take them up until after the filing of his petition, but that afterwards, the maker having become a bankrupt, the petitioner took up the notes and produced them before an auditor to whom the case had been referred and before the court to be cancelled, the petitioner is not required to give credit for the amount represented by the notes.

PETITION, filed December 23, 1898, to establish a mechanic's lien for labor and materials furnished by the petitioners as plumbers upon certain buildings of the respondent Wildes, who was adjudicated a bankrupt in October, 1898, the respondent Jacobs being the owner of the real estate on which the lien was claimed, it having been conveyed to him by Wildes, and the respondent Sprague being the trustee in bankruptcy of Wildes.

In the Superior Court the respondents at first were defaulted. Later the default was removed in accordance with an agreement of the parties by which it was agreed that the petitioners furnished the materials and performed the labor set forth in their petition and at the prices charged, and that the case should be sent to an auditor to determine what credits, if any, should be allowed against the amount claimed by the petitioners, "the investigation to be confined to the questions of payments or credits." After the filing of the auditor's report the case was tried before *Hardy*, J., who found for the petitioners in the sum of $868.75. The respondents alleged exceptions which were sustained by this court in a decision reported in 182 Mass. 482, referred to in the present opinion.

The case again was heard in the Superior Court by *Richardson*, J. on all questions except the issues previously submitted to the

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jury. The auditor's report was put in evidence, and Charles Moore, one of the petitioners, testified as a witness.

The respondents asked the judge to rule as follows:

"1. If the petitioners received from the respondent Wildes the notes A and B on account of the demand set forth in the petition, though not in payment or part payment, and if the petitioners indorsed said notes for value to one Basley and said Basley became the owner and holder of said notes, and if from time to time payments were made on account of said notes to said Basley, and finally said notes were combined in one renewal note, given to said Basley, upon which renewal note payments were made and other renewals of the balance given to said Basley, and at the time these proceedings were begun, and at the time Wildes went into bankruptcy said Basley was the owner and holder of the last renewal note, and said Basley had proved said note as his claim against the estate of said Wildes in bankruptcy, then the amount of said notes A and B should be credited on the demand set forth in the petition.

"2. If the respondent Wildes gave the petitioners the note C on account of the demand set forth in the petition, though not in payment or part payment thereof, and if said Wildes paid said note before these proceedings were begun, then the demand set forth in the petition should be credited with the amount of said note C.

"3. If the respondent Wildes gave to the petitioners on account of the demand set forth in this petition, the notes designated D and E, and if the petitioners indorsed said notes D and E for value to one Chipman, and said Chipman became the owner and holder of said notes, and while such owner and holder, said notes were combined in one renewal note, of which renewal note the said Chipman was the owner and holder, and if said renewal note was afterwards split into two notes, and said Chipman was the owner and holder of said two notes at the time these proceedings were begun, and at the time Wildes went into bankruptcy, then the amount of said notes D and E, being the amount of the last renewal note, should be credited upon the demand set forth in this petition.

"4. If the respondent Wildes gave to the petitioners the note F on account of the demand set forth in the petition, and if said

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note F was indorsed by the petitioners to said Chipman for value, and at the time these proceedings were begun, and at the time said Wildes went into bankruptcy, the said Chipman was the owner and holder thereof or of the renewal thereof, then the amount of said note should be credited on the demand set forth in the petition.

"5. On all the evidence the respondents are entitled to have credit for the amount of the notes A, B, C, D, E and F, or the renewals thereof.

"6. On all the evidence and agreed facts the respondents are entitled to have credit for the amount paid on the notes A, B, C, D, E and F, and the renewals thereof, and for the amount of the notes L, M, N and F prime, less such discount and interest as petitioners may be entitled to."

The judge refused to rule as requested, and made the following rulings and findings:

"1. I find that the amount for which (without credits) the land stated in the petition is subjected to lien for labor and materials set forth in the petition, amounts to $764.75 (without interest) on account and in part payment of which I find the petitioners have received $120, being made up of note C, referred to in the auditor's report, which was paid by the maker, Wildes, to the petitioners, and also $20 in money, leaving a balance of $644.75, which with interest thereon to the present date, amounts to $860.50.

"2. I rule as requested by the respondents in the second of their requests for rulings, but decline to rule as requested in the other five requests, excepting as to note C in the fifth and sixth requests, as to which note I gave the fifth and sixth requests."

The judge found for the petitioners, and ordered that a decree be entered establishing the lien for $860.50. The respondents alleged exceptions.

C. H. Sprague, for the respondents.

T. W. Proctor, for the petitioners.

HAMMOND, J. It has been established by the verdict of the jury that no one of the six notes A, B, C, D, E and F was received by the petitioners "in payment or part payment of their claim in suit." It is contended however by the respondents that by reason of the subsequent transactions with refer-

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ence to these notes, the amount of them should be credited to the respondents on the bill of the petitioners.

No question arises as to note C, because that was paid by Wildes and it has been credited on the account. As to notes A and B, the auditor reports that upon receiving them "the petitioners negotiated and indorsed and delivered them for value to one Basley, who became the owner and holder thereof, and while said Basley was the holder and owner they became due, and the said Wildes gave the said Basley renewals thereof from time to time, which renewals the petitioners indorsed, and the said Wildes made payments to the said Basley on account of said renewals until the amount due on both notes together was reduced to one hundred dollars ($100), for which amount said Wildes gave his note to the said Basley, which last note the petitioners indorsed, and at the time the petition in this lien case was filed, the said Basley was the owner and holder thereof, and said Basley proved said note against the estate of said Wildes in said bankruptcy proceedings." This last note was designated by the auditor as "L." Notes C and D were negotiated for value to one Chipman, and after various renewals and divisions similar to that above described as to notes A and B, finally were transformed into notes M and N, which at the time of the bringing of this petition were in the hands of Chipman as owner. The same general course was taken as to note F, upon which a partial payment was made, the balance finally being represented by note F, which at the time of the filing of this petition was in the hands of Chipman as owner. It does not appear that Basley has received any dividend from the estate of Wildes.

During the renewals and changes above set forth, there was no time when the petitioners were not liable as indorsers upon the outstanding paper, and since the beginning of this suit the notes L, F, M and N, into which (with the exception of note C which was paid by Wildes and the proceeds duly credited on the account), the original notes had become merged, have been paid by the petitioners, who at the hearing before the auditor and before the court, produced them in evidence and offered the same to be cancelled and returned to Wildes.

The respondents rely upon the doctrine of *Morton* v. *Austin*, 12 Cush. 389, 392, namely, that if a lien creditor accepts notes

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on a lien account and negotiates them he must take them up before he can effectively institute proceedings to enforce his lien. See also *Davis* v. *Parsons*, 157 Mass. 584, 588, and cases cited. It is to be noted, however, in the case at bar that the question whether the lien can be maintained is not now open to the respondents under the agreement which was filed when the default was taken off. It is to be assumed that the lien was properly filed, and we are of opinion that under that agreement the real question before the Superior Court at this second trial was "whether by reason of [these] subsequent transactions, including the payment of note C and the part payment of some others and the renewals, the petitioners had so far received the benefit as that some credit therefor should be given upon the account." See the report of this same case, 182 Mass. 482, 487. We are of opinion that the rule for which the respondents contend is not to be extended to a case where the issue is like this. Although the petitioners did not take up these notes until after the filing of their petitions, yet they subsequently took them up and produced them before the auditor and the court to be cancelled. Under the circumstances this was enough. They had received no benefit such as to require them to give credit for the amount represented by these notes.

We see no error in the manner in which the court dealt with the question of credits.

Exceptions overruled.

M. STEINERT AND SONS COMPANY *vs.* LAURA E. L. JACKSON.

Suffolk. November 23, 1905. — February 28, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Sale.

If a piano dealer sells a new piano to a woman and agrees to take in exchange her old piano which has been injured in an elevator while being moved by an expressman and to look to the expressman for the difference in value, he cannot recover this difference from her if the expressman refuses to pay it.

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CONTRACT for a balance of $300 alleged to be due for a piano sold by the plaintiff to the defendant. Writ dated April 18, 1902.

The answer contained a general denial and plea of payment. At the trial in the Superior Court before *Bell*, J. there was evidence tending to show that sometime in April, 1901, one of the plaintiff's agents and salesmen called on the defendant at her residence, pursuant to information previously given to him; that the defendant then told him that a few days before, while an expressman named Little, doing business as Danforth's Express, was moving her piano from an apartment hotel on Beacon Street in Brookline to a new residence, a freight elevator upon which was the piano with the men in charge of it fell and injured it; that the defendant said that the expressman had told her that he would pay for the repairs or furnish a new piano; that she said she had been informed that the repairs would cost about $300, and that by the payment of that sum her old piano could be exchanged for a new one; that the plaintiff's agent stated to her that she would be better satisfied to have a new piano rather than to have the old one repaired; that she stated that she would see the furniture mover, and, if she decided to have a new piano, would come into the plaintiff's store in Boston and select one; that a few days later she came to the plaintiff's store, saw another of the plaintiff's agents, told him of the occurrence above stated, and selected a piano as being satisfactory to her; that she told him to have it sent to her house, and to send the bill for the agreed price of $300 over and above the value of the old piano to Danforth's Express. There was evidence on the part of the defendant, denied on behalf of the plaintiff, that at this time the defendant told the plaintiff's agent not to send the piano to her until the plaintiff was satisfied that Little, called Danforth's Express, would pay the bill.

The piano was shipped by the plaintiff to the defendant, and the defendant's old piano was repaired and sold by the plaintiff. The plaintiff sent to Little a bill made out to Danforth's Express for $300 as the difference in price between the new piano and the old one. Little returned the bill, stating that he had not ordered the piano and would not pay for it.

There was evidence tending to show that on the night of the

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injury to the piano Little told the defendant not to worry, that either he or the owner of the building would make it all right with her either by repairing the old piano or buying a new one, that on the next day Little was advised by counsel that he was not liable for the falling of the elevator, and notified the defendant that he was so advised and would not be responsible for the injury to the piano; and that this was before the defendant visited the plaintiff's store and selected the new piano.

After Little returned the bill to the plaintiff, the bill was sent to the defendant, and a demand was made for payment. The defendant refused payment, but retained the piano, making no effort to collect either from Little or the owner of the building any damage for the injury done to her piano. She did not offer, nor did the plaintiff request her, to return the piano in question to the plaintiff, nor to assign to the plaintiff any claim for damages which she might have as against Little or the owner of the building.

The plaintiff requested the following rulings:

1. On all the evidence the plaintiff is entitled to recover.

2. If the defendant ordered, received and has kept the piano, she must pay for it, unless on a fair preponderance of the evidence the jury should find that the plaintiff sold the piano to Danforth's Express through her as the agent of that express.

3. If the defendant received the piano expecting it to be paid for by the express company, her failure to return the piano on discovering that the express company repudiated responsibility amounts to a ratification of the sale to her, and she is liable.

The judge refused to make any of these rulings, but instructed the jury that if at the time the defendant ordered the piano of the plaintiff, it was agreed between the plaintiff and the defendant that the piano in question should be shipped to the defendant and title pass to her, but that the plaintiff should look to Little and to him alone for the payment of the sum of $300 agreed upon as the difference between the value of the old piano and the price of the new one, the plaintiff could not recover.

The judge at the conclusion of the charge stated that he did not charge the jury upon the supposition that the defendant was the agent of Danforth's Express, because he understood that the

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defendant disclaimed that she was such agent. The defendant made no objection to this statement.

The jury returned a verdict for the defendant; and the plaintiff alleged exceptions.

G. W. Anderson, for the plaintiff.

J. G. Forbes, for the defendant.

MORTON, J. This is an action of contract to recover a balance of $300 alleged to be due on account of a piano sold by the plaintiff to the defendant. There was a verdict for the defendant, and the case is here on exceptions by the plaintiff to the refusal of the judge to give certain rulings asked for and to the rulings that were given.

We think that the rulings were right. The question at issue was a simple one and related to the terms of the sale. The defendant contended and introduced testimony tending to show that the plaintiff took her piano, which had been injured in an elevator while being moved by an expressman, and sold her a new piano, agreeing to look to the expressman for the difference, $300. She disclaimed any authority to act for or represent the expressman, and no question of agency was involved. The plaintiff denied that the contract was as represented by the defendant. The judge instructed the jury, in substance, that if the plaintiff agreed to look to the expressman for the difference between the value of the old piano and the price of the new one, it could not recover from the defendant. The jury found for the defendant.

There clearly was evidence for the consideration of the jury in regard to the terms of the sale, and no question of agency being involved the plaintiff's requests were refused rightly.

Exceptions overruled.

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SUSAN E. P. FORBES & others *vs.* BYFIELD WOOLEN COMPANY.

Essex. November 28, 1905. — February 28, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Practice, Civil, Exceptions. *Mill Act. Water Rights.*

Upon a bill of exceptions to the findings and rulings of a judge sitting without a jury, which does not contain all the evidence and omits among other things an auditor's report, and where the judge has taken a view the result of which does not appear except as disclosed by his findings, the findings of the judge upon a question of fact will not be disturbed, especially where there is evidence reported in the bill of exceptions which warrants them.

A complaint under the mill act, Pub. Sts. c. 190, for damages from the alleged wrongful flowing of the complainant's land by a dam maintained by the respondent, was heard, except as to damages, by a judge, sitting without a jury, who found that the respondent within the three years next preceding the complaint had maintained its dam at a greater height than it had a right to do without making compensation. On exceptions by the respondent to the refusal of the judge to make certain findings and rulings and to the findings and rulings made by him, all the evidence was not reported and an auditor's report considered by the judge was not before this court. It appeared that the judge took a view of the dam and that the apron was removed from it and some excavations made in order that he might see whether the capsill put in at a certain time rested upon the original stone work or otherwise. What was disclosed by the view did not appear except as it might be inferred from the findings. There was nothing in the deeds put in evidence or in any writing between the parties and their privies fixing the height at which the respondent and its predecessors had the right to maintain the dam, and the right of the respondent depended upon a question of fact to be determined upon the evidence relating to the height at which the respondent had maintained its dam and exercised the privilege of flowing. *Held,* that the findings of the judge were warranted by the evidence reported in the bill of exceptions which the court did not find it necessary to review in the opinion.

MORTON, J. This is a complaint under the mill act so called, Pub. Sts. c. 190, R. L. c. 196, filed June 30, 1900, to recover damages for the wrongful flowing of the lands of the petitioners by a dam maintained by the respondent, and to have bounds fixed establishing the height to which the respondent may flow. The respondent, in addition to a general denial, answered in bar that it had "a right to maintain its dam in the manner and to the height at which the same is now maintained, and has been maintained for three years next preceding the bringing of this complaint, without the payment of any compensation to said com-

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plainants, or to any of them." The case was tried, as to the matters relating to the answer in bar and the height to which the respondent has a right to flow, before a judge of the Superior Court, without a jury, and afterwards was submitted to a jury on the question of damages. No question arises in regard to the damages, and the case is here on exceptions by the respondent to the refusal of the judge at the trial without a jury to make certain findings and rulings requested by it, and to the findings and rulings that were made.

The judge found the legal height of the dam to be twelve inches below the bottom of the bolt holes in a certain rock, "with the right to whatever flowage results from that height"; meaning, as we understand the finding, that the height to which the respondent could maintain its dam and flow accordingly without compensation was twelve inches below the bolt holes. The judge also found that the legal width of the waterway was forty-four feet but that it had been narrowed, and that an addition had been made at the ends of the dam which the judge was unable to determine exactly, but which was, he found, at least equal in height to the bolt holes. And the judge found and ruled on the whole case, that the respondent had maintained its dam within the three years next preceding the bringing of the complaint higher than it had the right to do without compensation.

The respondent asked the judge to rule that on all the evidence the complainants were not entitled to a finding against it and that during the time referred to in the complaint the respondent had violated no rights of the complainants, and had a right to maintain its dam so as to flow to the under side of the bolt holes. The respondent also asked the judge, if he found that it had maintained its dam higher than it had the right to, or had violated the rights of the complainants, "to find to what extent, in which respect and for how long a time." This the judge declined to do, except so far as he had done so in the memorandum which he filed, and which, if the matter was not one addressed to his discretion, appears to us in substance and effect to have complied with the request thus made. At any rate, if the matter was one of right, no contention is now made that the request was not complied with.

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Not all of the evidence is reported. The auditor's report, for instance, is not before us.

The judge also took a view and "the apron was removed from the dam and some excavations made that the judge might see whether the capsill put in in 1898 rested upon the original stone work or otherwise." What was disclosed by the view does not appear otherwise than as may be inferred from the findings.

The evidence tended to show that a dam had been erected and maintained by the respondent and its predecessors in title for a long time for the working of a mill owned by them, and that lands belonging to the complainants were and had been flowed thereby. But except in two instances occurring in the respondent's chain of title and that of the complainant Forbes, there is nothing in any of the deeds to show the height to which the respondent could maintain its dam and flow. In both of these cases the right of flowing was limited to the under side of the bolt holes above referred to. One of these limitations occurred in a lease of the mill and privilege for the term of seven years, and the other in a deed of a moiety of a tract of six acres which included the mill and privileges and afterwards was reconveyed to the grantor. The lease expired by its own limitation and the reconveyance of the moiety put the grantor in as of his former estate and extinguished the right of flowage which had been conveyed, as the judge, in effect, ruled at the respondent's request. In the absence, therefore, of anything in the deeds and of any writing between the parties and their privies fixing the height to which the respondent and its predecessors could maintain their dam and flow, the question became a question of fact to be determined upon the evidence in the case relating to the height to which the respondent had maintained its dam and exercised the privilege of flowing. And without undertaking here to review the testimony we deem it enough to say that, after a careful examination of it, the findings of the presiding judge seem to us well warranted by the evidence reported in the bill of exceptions.

The respondent claims an unlimited right of flowage as against the petitioner Forbes. But there is nothing in any of the deeds, except perhaps some of the earliest ones, under which the respondent can claim to have any such right. And there was

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evidence warranting a finding that no such right had been claimed or exercised for upwards of forty years. We are of the opinion that there is nothing to control in respect to her the general findings of the judge in regard to the height to which the respondent has a right to maintain its dam and flow.

Exceptions overruled.

F. H. Williams, for the respondent.
H. I. Bartlett, for the complainants.

LAURENCE MINOT, trustee, *vs.* NATHANIEL B. DOGGETT, executor, & others.

Suffolk. December 4, 1905. — February 28, 1906.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Devise and Legacy. Perpetuities.

A will contained the following provision: "And as to the other fourth part of the residue and remainder of my estate, I direct my said trustees to hold the same (after my said daughter S.'s decease) during the lives of her children, and to pay the net interest and income thereof to her children half yearly or oftener, if convenient to said trustees, and at the decease of said S.'s children the said fourth part of the capital of said residue and remainder of my estate shall be paid to her grandchildren, as they respectively attain the age of twenty-one years, such grandchildren taking by right of representation, and while said grandchildren are minors, after the decease of their parents they shall respectively receive the net income of the capital to which they will severally be entitled to at their majority." At the time of the death of the testator S. had one child, a son. Afterwards she had a daughter who died before her without issue. Upon the death of the son of S., who survived his mother and left children, the trustee under the will of the testator brought a bill for instructions as to the distribution of the fund dealt with by the paragraph above quoted, asking whether the remainders to the grandchildren of S. were void under the rule against perpetuities. *Held*, that the bequest to the children of S. was of shares to be disposed of separately and that the limitation over of each share was to be considered by itself, that on the death of the testator the son of S. had a vested remainder in a life interest in the fund which on the birth of the daughter of S. was diminished by opening to give such daughter a vested remainder in a life interest in one half of the fund, that the remainder of one half of the fund to the children of the son of S. was valid because the son was born before the death of the testator, and that the half of the fund in which the daughter of S. had a vested interest, upon her death before her mother

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without issue, was undisposed of by the will and should be distributed among the next of kin of the testator. *Semble*, that if the daughter of S. had left children the same result would have been reached, as the remainder to her children was void under the rule against perpetuities.

BILL IN EQUITY, filed September 6, 1904, by the trustee under the will of William Taylor, late of Roxbury then in the county of Norfolk, for instructions as to the distribution of a certain fund under that will upon the death of William T. Kennedy, the son of Sarah A. W. Kennedy, afterwards Sarah A. W. Devens, a daughter of the testator.

The case came on to be heard before *Hammond*, J., who reserved it upon the bill and answers for determination by this court.

F. Brewster, for the trustee.

W. H. Dunbar, for Nathaniel B. Doggett and others.

F. M. Sparrow, for George Purrington, Jr.

Roland Gray, for Charles E. Kennedy and Addie F. Barrock.

R. E. Smith, (*F. C. Allen* with him,) for Walter G. Kennedy and for Ella F. Kennedy, guardian of George B. Kennedy.

KNOWLTON, C. J. A part of the eighth clause of the will of William Taylor, late of Roxbury, deceased, is as follows: "And as to the other fourth part of the residue and remainder of my estate, I direct my said trustees to hold the same (after my said daughter Sarah's decease) during the lives of her children, and to pay the net interest and income thereof to her children half yearly or oftener, if convenient to said trustees, and at the decease of said Sarah's children the said fourth part of the capital of said residue and remainder of my estate shall be paid to her grandchildren, as they respectively attain the age of twenty-one years, such grandchildren taking by right of representation, and while said grandchildren are minors, after the decease of their parents they shall respectively receive the net income of the capital to which they will severally be entitled to at their majority."

The plaintiff, as trustee under this will, asks for instructions upon the question whether the remainders to the grandchildren of the testator's daughter Sarah are void under the rule against perpetuities, or valid. This daughter was a young woman at the time of the testator's death, and she might have been expected

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to have children born long afterwards, and grandchildren born later than the end of a life or lives then in being and twenty-one years thereafter. If, therefore, the grandchildren are to be treated as all members of one class who are to be considered together, some members of which would come into being too late to be recipients of the testator's bounty under the rule just referred to, it is obvious that the limitation over to the members of this class, after the expiration of the life estates of the children, would be too remote and would fail altogether. It is contended in behalf of the heirs at law that this is the true construction of the provision.

We are of opinion that this contention is not well founded, and that the case should be governed by the rule applied in *Dorr* v. *Lovering*, 147 Mass. 530. In this case it was held that the devise to the children was of shares afterwards to be disposed of separately, and that the limitation over, in reference to each share, was to be considered by itself alone, and was valid because, in each case that arose, the birth of the remaindermen could not have been too late. The fact that there might have been after born children whose children would have been unable to take, under the rule against perpetuities, was held to be immaterial in the determination of the rights of the descendants of the children who were born in the lifetime of the testator. That the shares of the children of Sarah are to be considered separately appears first in the provision that they are to be "paid to her grandchildren, as they respectively attain the age of twenty-one years, such grandchildren taking by right of representation"; secondly, in the provision that "while said grandchildren are minors, after the decease of their parents they shall respectively receive the net income of the capital to which they will severally be entitled to at their majority"; and thirdly, that they take "by right of representation." The intention of the testator in this particular could not be carried out without dealing with the share of each of the children by itself alone. *Brown* v. *Farmer*, 184 Mass. 136, 138.

No question can be raised as to the validity of the provision giving life estates to Sarah's children after her death, and these vested at the death of the testator, subject to change by opening to let in after born children. *Lovering* v. *Lovering*, 129 Mass.

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97. *Dorr* v. *Lovering*, 147 Mass. 530. *Hills* v. *Simonds*, 125 Mass. 536, 538. *Hatfield* v. *Sohier*, 114 Mass. 48. *Dole* v. *Keyes*, 143 Mass. 237. At that time Sarah had one child, William T. Kennedy, and afterwards she had a daughter, Sarah Devens, by a subsequent marriage. On the birth of this last child, each had a vested remainder in a life estate in an undivided half of their mother's share, subject to be diminished by opening to let in other children, if any should be born later, with remainder over to their respective children, Sarah's grandchildren. This remainder to Kennedy's children was valid because he was born before the death of the testator, while the remainder to the children of Sarah Devens, if she had left any, would have been too remote, because she was born after his death. Inasmuch as the shares of the testator's daughter Sarah are to be considered separately, in reference to the disposition of them after the death of these children, it follows that the will has left the share, formerly held for life by Sarah Devens, undisposed of. *Merriam* v. *Simonds*, 121 Mass. 198, 201. Since she died before her mother, leaving no children, there is no provision of the will which is applicable to the remainder in her share after the expiration of her life estate. If she had left children, the provision which then would have been applicable would have been void under the rule against perpetuities.

It follows that one half of the fourth part which was held for the testator's daughter Sarah must go in equal shares to the four children of William T. Kennedy, namely: Addie F. Barrock, Charles E. Kennedy, Walter G. Kennedy and George B. Kennedy. The other half of this fourth part is to be divided among the heirs at law of the testator, William Taylor, as undevised estate.

In the opinion in *Minot* v. *Taylor*, 129 Mass. 160, relative to this will, is the following sentence, which at first sight seems inconsistent with the result we have reached: "The limitation of a life estate to the children of Sarah is a valid limitation, as it vested in her child William T. Kennedy at the death of Sarah, and it is the duty of the trustee to pay the income of her share to him during his life." In that case the court expressly declined to consider the question whether the limitation over to the grandchildren of Sarah is void for remoteness, and no claim

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was made by the heirs at law for any part of the remainder which vested for life in Sarah Devens. The case was submitted to the full court upon a report of facts which shows that the testator's daughter Sarah had one child, William T. Kennedy, and does not mention the fact that she had had another child who died in her lifetime. Apparently the birth and death of Sarah Devens were not brought to the attention of this court. It was referred to in the pleadings, but was not mentioned in the report, which in terms purported to state the facts on which the decision was to be made, and it was not referred to in the briefs. That case is not in conflict with the present decision.

Decree accordingly.

KATHARINE C. ROCKWELL *vs.* JOHN F. KELLY & others.

Suffolk. December 5, 1905. — February 28, 1906.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Mechanic's Lien. Bond. Estoppel. Attorney at Law.

A bond given under R. L. c. 197, § 28, to dissolve a mechanic's lien, approved by a master in chancery without causing an appraisal to be made of the property to be released, as required by R. L. c. 167, § 121, where the parties have not agreed upon the value of the property, has no effect to dissolve the lien.

Where the counsel of one holding a mechanic's lien on real estate receives from a registry of deeds in the usual course of his professional business with other papers a bond given under R. L. c. 197, § 28, purporting to dissolve the lien, having no knowledge that the bond is invalid, this does not estop his client from showing that the bond has no effect to dissolve the lien because a master in chancery approved it without causing an appraisal to be made.

BILL IN EQUITY, filed in the Superior Court on July 5, 1904, against John F. Kelly, a deputy sheriff, and John Holmes, John McHugh and John J. Walsh, respectively claiming mechanics' liens on a parcel of land owned by the plaintiff on Abbott Street in that part of Boston called Dorchester, the plaintiff's title having been derived by mesne conveyances from the foreclosure of a second mortgage given by Moses T. Hughes to William A. Porter, dated September 25, 1903, and foreclosed on March 30, 1904, to enjoin the defendants from enforcing the liens so claimed by them.

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In the Superior Court the case was heard by *Sheldon*, J. It appeared that the defendants McHugh and Walsh perfected their respective liens and took out an order of sale dated May 20, 1904, and that the liens antedated and had priority over the mortgage through which the plaintiff claimed unless they had been dissolved; and that one Clarence E. Hill, to whom Porter had assigned the mortgage gave bonds under R. L. c. 197, § 28, to dissolve the liens. The judge ruled that the bonds did not dissolve the liens, and made a final decree dismissing the bill without costs. The plaintiff appealed.

G. W. Estabrook, for the plaintiff.

James Ballantyne & John Ballantyne, for Holmes, submitted a brief.

R. J. Lane, for McHugh.

P. W. Carver, for Walsh.

BRALEY, J. Unless the liens of the defendants were dissolved by the bonds given by the plaintiff's predecessor in title they are paramount to the mortgage under the foreclosure of which she owns the premises, and the bill must be dismissed.

It may be assumed, without deciding, that Hill, as assignee of the second mortgagee, had such an interest in the land, even if the conveyance by Hughes originally was voluntary, and therefore voidable by creditors, as to bring him within the provisions of R. L. c. 197, § 28, permitting a dissolution of the liens by giving bonds. *Breed* v. *Gardner*, 187 Mass. 300.

The purpose of this statute is to allow any one possessing an interest in the whole or any part of the realty to free his title from such an incumbrance and to prevent the land from being sold to satisfy the lien.

While a proper bond dissolves it only as to the interest of the principal, leaving unaffected the right of other persons in the premises, yet to effectuate this purpose the statutory condition must appear in the instrument, which is to pay the lienor the amount fixed as the value of his legal or equitable ownership, or so much of the valuation as may be required to satisfy either the whole claim, or the proportionate part which the obligor's interest may be required to contribute. *Taunton Savings Bank* v. *Burrell*, 179 Mass. 421.

If the pecuniary value of the interest to be released is not as-

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certained by agreement, then proceedings may be had similar to those provided for the approval of bonds given to dissolve attachments, where the amount is determined by a magistrate having jurisdiction under R. L. c. 167, § 121. The inquiry which the acting magistrate has to make is judicial, and cannot be dispensed with, even if a penal sum is named, as in the present case, which was in excess of the amount of each lien. But for the statute the liens could not be dissolved in this manner, and while the bonds which were furnished may have been, and probably were as ample security for the protection of the lienors as if this condition had been actually complied with, yet the right to give them being a statutory remedy, to work a dissolution by way of substitution they must be in strict conformity with the statute.

The undisputed evidence makes it certain that the magistrate, who as a master in chancery approved the bonds, before doing so caused no appraisal to be made, and did not pass upon this question, but being of opinion that the penal sum in each was sufficient to fully protect the obligees stated the value of the interest of the principal in the premises at the same amount. Because of his failure to comply with this requirement there was no valid condition in either bond, and consequently the liens remained undischarged.

It is further urged by the plaintiff that these obligations were enforceable at common law, and that the defendants by reason of their subsequent conduct are estopped to set up the defence of invalidity. They were, however, under no duty to declare their intention of accepting one form of security for the other unless before her purchase the plaintiff upon inquiring of them concerning the title she was about to take had been misled, or informed that the liens no longer attached, but this she is not shown to have done.

After the bonds were recorded they remained in the registry of deeds except that the counsel for one of the defendants received from the register the bond running to his client, and although under some circumstances this might be treated as an effectual act of acceptance, such an act is not enough to work an estoppel where it appears, as in this case, that at the time of reception he had no knowledge the bond was invalid, and in the

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usual course of his professional business unintentionally received it with other papers. *Stiff* v. *Ashton*, 155 Mass. 130. Besides there is not the slightest evidence that the plaintiff purchased the property because she was informed, or believed that it was unincumbered by these liens, or that either of the lienors have acted at any time with the intention of misleading her, or inducing her to buy at a disadvantage, and therefore they are not precluded from asserting their respective rights. *Tyler* v. *Odd Fellows' Mutual Relief Assoc.* 145 Mass. 134.

Decree affirmed.

INHABITANTS OF BELMONT *vs.* NEW ENGLAND BRICK COMPANY.

Middlesex. December 5, 6, 1905. — February 28, 1906.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Nuisance. Board of Health.

Under R. L. c. 75, §§ 65, 67, an order from the board of health of a city or town to the owner or occupier of private premises to remove a source of filth or cause of sickness cannot direct that the nuisance shall be abated in a specific way, and the owner may abate the nuisance in any proper manner.

Under R. L. c. 75, §§ 91–98, if a trade or employment is designated by a general order of the board of health of a city or town as offensive, before such an order can be enforced it must be served upon the occupant or person having charge of the premises where such trade or employment is exercised, and a notice by publication in a newspaper which also is sent by mail to the persons against whom the proceedings are taken is insufficient.

An order of the board of health of a town prohibiting the exercise of the trade or employment of excavating clay for the purpose of manufacturing bricks within the limits of the town, except upon the premises "now owned and operated" by a certain brick company, without a written permit from the board of health, not to be granted unless the applicant shall furnish a bond with good and sufficient sureties conditioned upon the observance of the terms of the permit and upon the filling within a reasonable time to be fixed by the board with materials and in a manner satisfactory to the board of any excavations made by the obligor, is unreasonable and void, and cannot be enforced against the brick company the continued operation of whose business on its old premises is excepted.

BILL IN EQUITY, filed in the Superior Court on May 29, 1903, by the inhabitants of the town of Belmont against the New

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England Brick Company, alleging that the board of health on February 7 passed the following order of prohibition:

"Reg. 19. The exercise of the trade or employment of excavating clay for the purpose of manufacturing bricks, (except upon the premises now owned and operated by the New England Brick Co.,) is hereby prohibited within the limits of the town of Belmont, except in accordance with a written permit to be first granted by the Board of Health of said town.

"Any person, firm or corporation desiring to exercise said trade or employment within the limits of said town, must make written application for a permit, to said Board of Health, subject to its approval, and must describe in said application the premises upon which the applicant desires to exercise said trade or employment, and must state the time when and within which the applicant desires to exercise said trade or employment, and also the depth and area of the excavation or excavations said applicant desires to make.

"Said board will not grant such permit unless said applicant shall first furnish a bond with good and sufficient sureties (the amount of said bond, and said sureties, to be satisfactory to said Board), running to the town of Belmont, and conditioned upon the observance by said applicant of the terms of said permit, and also upon the filling in, within reasonable time, to be fixed by said board, and with proper materials and in a manner satisfactory to said board, any excavation or excavations to be made by said applicant."

The bill further alleged that on February 7, 1902, the order was entered in the records of the town and was published in the same month in the Belmont Bulletin, a newspaper published at Belmont, The Watertown Enterprise, a newspaper published at Watertown, and in the Cambridge Chronicle, a newspaper published in Cambridge, and that in addition to this publication the board of health on February 24, 1902, caused a copy of the order "to be deposited in the mails, postage prepaid, and duly directed to the defendant."

The bill further alleged that on February 7, 1902, the defendant was carrying on the trade or employment of excavating clay for the purpose of manufacturing brick within the limits of the town upon a certain parcel of land, which was the land excepted from the operation of the foregoing order.

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The seventh paragraph alleged that on or about October 8, 1902, the defendant purchased and acquired another parcel of land, described.

The eighth and ninth paragraphs were as follows:

"8. The defendant, so being the owner of the parcel of land described in the seventh paragraph of this bill as aforesaid, is engaged upon said parcel in exercising the trade and employment of excavating clay for the purpose of manufacturing bricks, not having made written application to said Board of Health for a permit so to do and not having been by said Board of Health first granted a written permit so to do as required by the order hereinbefore set forth.

"9. Such use of said premises by the defendant is a nuisance, is hurtful to the inhabitants there dwelling, passing, repassing and being, injurious to their estates, dangerous to the public health and is attended by noisome and injurious odors."

The bill prayed that the defendant and its servants and agents might be restrained from exercising upon the premises described the seventh paragraph of the bill the employment described in the order of the board of health.

The allegations of the bill which are above described and set forth were admitted by the defendant except those contained in the ninth paragraph.

In the Superior Court the case was heard by *Pierce*, J. At the close of the plaintiff's evidence the judge ordered that the bill be dismissed, and, at the request of the plaintiff, reserved the case for determination by this court, upon the questions (1) whether the order of the board of health set forth in the bill was within the powers of the board of health, and (2) whether it was a reasonable regulation. If both of these questions were answered in the affirmative the case was to stand for hearing in the Superior Court; if either question was answered in the negative the decree dismissing the bill was to stand. The character of the evidence is indicated sufficiently in the opinion.

T. W. Proctor, for the plaintiff.

W. Keyes, for the defendant.

BRALEY, J. By the decree dismissing the bill the questions that might have arisen under the defendant's demurrer and motion to frame issues to be tried by a jury are rendered imma-

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terial, and the only question presented for our decision is the validity of the order passed by the board of health, which under the terms of the reservation must be construed to mean whether upon the evidence introduced by the plaintiff, and which is fully reported, the bill can be maintained.

In the exercise of the plenary statutory authority with which it is clothed a board of health of a town may make such general regulations for the protection of the public health as are reasonable and expedient, and may declare that certain employments by the offensive or filthy manner in which they are conducted are injurious to the community, and should be entirely prohibited, or regulated in such manner as they may prescribe, or that they constitute a nuisance which should be abated. R. L. c. 75, §§ 65, 91. *Belcher* v. *Farrar*, 8 Allen, 325. *Taunton* v. *Taylor*, 116 Mass. 254. *Sawyer* v. *State Board of Health*, 125 Mass. 182, 191. *Train* v. *Boston Disinfecting Co.* 144 Mass. 523, 526. After being duly promulgated and served such regulations, or orders, until revoked, modified, or declared void, have the force of law. *Salem* v. *Eastern Railroad*, 98 Mass. 431, 443.

But the power to prohibit or regulate offensive trades is to be exercised in a manner distinct from the enforcing of general regulations passed under § 65 for the suppression of "sources of filth and causes of sickness . . . which may . . . be injurious to the public health." R. L. c. 75, §§ 91–98. *Commonwealth* v. *Young*, 135 Mass. 526. *Quincy* v. *Kennard*, 151 Mass. 568. *Cambridge* v. *Trelegan*, 181 Mass. 565. *Commonwealth* v. *Rawson*, 188 Mass. 491. *Taunton* v. *Taylor*, 116 Mass. 254. *Sawyer* v. *State Board of Health*, 125 Mass. 182.

It must be assumed that the order under which it is sought to maintain the bill was passed in accordance with the provisions of § 91, for the authority conferred by § 65 does not justify an order, that a nuisance shall be abated in a specific way. If a nuisance exists which the landowner when so ordered under § 67 must abate, he may do so in any proper manner. *Watuppa Reservoir Co.* v. *Mackenzie*, 182 Mass. 71. *Commonwealth* v. *Alden*, 143 Mass. 113, 117.

In proceedings under § 91 if a trade, business or employment designated by a general order or regulation as offensive is to be suppressed when not conducted in the manner therein specified,

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before such an order can be enforced in a specific case, under § 94, it must be served upon the occupant, or person in charge of the premises where the prohibited business is carried on, or the trade or employment is exercised. This requirement is for the purpose of enabling those who own or are interested in the property that may be thus affected or those deprived of a trade or employment to appeal from the order and to test its validity by a trial before a jury in the Superior Court as provided by § 95. A notice given by publication in a newspaper, or through the mail directly addressed to those against whom proceedings are to be taken, which was the course followed in the present case, is insufficient because not in conformity with this section. See *Commonwealth* v. *Alden*, *ubi supra*. Unless this jurisdictional requirement is observed so that the right to a jury trial may be had, at the option of the person aggrieved, in which the proceedings may be reviewed and either annulled or modified, the enforcement of the order as to him becomes a nullity. *Commonwealth* v. *Young*, *ubi supra*. See *Commonwealth* v. *Taylor*, *ubi supra*, and *Commonwealth* v. *Rawson*, 183 Mass. 491, 494. But independently of this failure properly to notify the defendant, which is sufficient to sustain the decree dismissing the bill, the regulation cannot be sustained.

Even if before taking action, in the first instance, the board had granted an opportunity to be heard to those whose rights of property might thereby be seriously impaired, yet in the attempt to enforce the order by this suit the jurisdiction of the board is not to be assumed conclusively, and may be reviewed to determine whether the general sanitary conditions shown justified the action taken as reasonable, or whether "the exercise of the trade, or employment of excavating clay for the purpose of manufacturing bricks" actually was the cause of the spread of malaria. *Miller* v. *Horton*, 152 Mass. 540, 545.

To make bricks requires clay, and the occupation of manufacturing them in which the defendant was engaged is not within the class of employments presumably offensive, or for which under R. L. c. 75, § 99, a license must be obtained before they can be prosecuted lawfully. Neither is this business generally recognized as directly harmful to the health or property of the community. But the prohibition that clay could not be dug for

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this purpose except out of land owned by the defendant when the order was passed might be indirectly sufficient to prevent the further transaction of its business for want of material, and if the acquisition of the additional land described in the bill from which clay could be dug became necessary the prohibition might come very near to being a confiscation of property rights without compensation. *Commonwealth* v. *Boston Advertising Co.* 188 Mass. 348.

Prohibiting by a town ordinance the blasting of rocks with gunpowder, when this is required for the public safety, undoubtedly is within the powers given to towns by R. L. c. 25, § 23, when construed in connection with R. L. c. 102, §§ 93, 96 and 99, and similar action may be taken by a town board of health under R. L. c. 75, § 91. *Commonwealth* v. *Parks*, 155 Mass. 531. But the difference between quarrying stone by the frequent use of an explosive that generally is regarded as so dangerous that its keeping and sale is carefully regulated by statute, and where such use may be and frequently is attended with serious consequences to persons or property, and that of working the soil in the ordinary way for clay is obvious. The first process whatever precautions are taken may be considered as intrinsically dangerous to the public, while the other is harmless.

Upon resorting, however, to the evidence in connection with the eighth and ninth paragraphs of the bill, as there is no proof of "noisome and injurious odors," it becomes clear that neither the digging of clay nor the process of its manufacture into bricks of itself was noxious, but if the pit from which it was dug remained unfilled water accumulated, which upon becoming stagnant provided a breeding place for mosquitos by which the disease of malaria, prevalent in the town, might be transmitted from a person suffering with this disease to those who before had been unaffected.

The owner of land in which it is found may make the digging and selling of clay an employment or source of revenue, and it is common knowledge that this product is used for other purposes than that to which it is put by the defendant, and the menace to the public health would be no greater from an unfilled pit for whatever purpose the contents had been removed.

The object of the board was to prevent the breeding of mos-

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quitos, which conveyed disease, by prohibiting the establishment of breeding grounds where they might be generated. But it also follows that any pool of water thus artificially formed, when of sufficient age, would be equally objectionable, and the real condition to be remedied is the creation and maintenance of this source of sickness. Until the water stagnated, and mosquitos were bred, the action of the landowner had not become injurious to the community, and for the benefit of the public to destroy, or impair his right to convert his property into money, where the process of conversion in itself is innocent, is unnecessary and oppressive.

A regulation declaring that water when so accumulated, if permitted to stagnate, was the means by which the public health might be injuriously affected, and hence constituted a nuisance, the creation of which was forbidden, would have provided ample sanitary protection, and would have been free from the objection found in the present order, which in its scope sought to provide a remedy that when put in operation practically caused an impairment of private rights so disproportionate with the gain to the public health as to make it unreasonable, and therefore invalid. *Bent* v. *Emery*, 173 Mass. 495, 496. It contains another important feature which lends additional strength to this failure of reasonable adjustment between the result sought to be accomplished, and the method employed to obtain it. A provision is found that if a bond with sufficient sureties is given conditioned to dig and refill at such times and in such manner as the board may direct, then the clay may be dug, but this unusual and anomalous requirement imposes a restrictive burden that might become so oppressive as to entirely prevent the pursuit of a lawful and harmless employment, and in some cases probably would be tantamount to an indirect destruction of a valuable right in real property, as a landowner who was unable to furnish such a bond might be deprived of a substantial source of income. There is, moreover, no statute authorizing the imposition of such a precedent condition, or that makes such an instrument when taken a valid obligation which may be enforced by the town.

Indeed, the remedies provided for the preservation of the public health are ample, and while by implication authority is con-

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ferred to restrict by suitable regulations the manner in which certain employments deemed offensive and injurious shall be exercised, a board of health, in the absence of legislative sanction, cannot exact a bond as security for their performance as the absolute prohibition of the business, to be followed by pecuniary forfeiture if it is continued unlawfully, must be treated as providing exclusive penalties for their violation. R. L. c. 75, § 94. *Sawyer* v. *State Board of Health*, 125 Mass. 182. *Lowell* v. *Archambault*, 189 Mass. 70, 73. See *Hawthorn* v. *People*, 109 Ill. 302.

Decree affirmed.

ANDREW B. SUNTER & another *vs.* WILLIAM M. SUNTER.

Suffolk. December 6, 1905. — February 28, 1906.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Deed. Guardian. Equity Jurisdiction, Laches, For an accounting.

A deed of real estate from a mother to a son, one of her three children, recited that it was given in consideration of one dollar and other good and valuable considerations, and contained a clause declaring the conveyance to be upon the condition, that the grantee and his heirs and assigns and all future owners of the estate should support the grantor for and during the term of her natural life. It was found that the conveyance was made by the mother to her son out of gratitude for his kindness to and care of her in the past and his promise to care for her in the future, and that the son, although willing to do so, did not in fact support his mother at any time from the giving of the deed until her death. *Held*, that the deed was a voluntary conveyance and that the son had no better title than his mother.

If a guardian, who has obtained a license from the Probate Court to sell real estate of his infant ward for the maintenance of the ward, conveys the real estate through a third person to himself for his own benefit, the ward on coming of age may avoid the conveyance.

There can be no laches where a plaintiff exercising reasonable diligence has remained for many years in ignorance of the facts which give him a right to relief in equity and on learning the facts files his bill.

In 1887 a widow, who had been appointed the guardian of her three minor children, conveyed to herself through a third person certain land belonging to her wards without paying anything for their benefit. She then built a house on the land which she used for her own benefit. The three children came of age respectively in 1889, 1893 and 1896. In December, 1903, she made a voluntary conveyance of the real estate to one of the three children, having given him possession of the property in November of the previous year, and in February, 1904, died. Two months after her death her other two children

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brought a suit in equity to set aside the conveyance of their mother indirectly to herself in 1887, and for an accounting. It appeared that the plaintiffs knew nothing of what their mother had done in regard to the real estate until after her death. *Held*, that there was no laches on the part of the plaintiffs.

Since the enactment of St. 1807, c. 75, now embodied in R. L. c. 179, § 17, one who individually or by those under whom he claims has actually held and possessed land for six years before the date of a writ of entry on which a judgment for the land has been obtained against him is entitled to compensation for the value of any buildings or improvements made or erected on the land by him or by any person under whom he claims, and the statute gives him the same right where a title is established against him in a suit in equity instead of by a writ of entry.

In a suit in equity to set aside a conveyance of real estate made by the mother of the plaintiffs as the guardian of the plaintiffs and their brother, the defendant, through a third person to herself for her own benefit, and for an accounting by the defendant to whom the mother made a voluntary conveyance of the real estate two months before her death, having given him possession of the property a year earlier, it appeared that the conveyance, which was voidable by the plaintiffs, was made in 1887, by the mother of the parties, who treated the property as if it was her own, that the property then was unimproved land said to be worth $2,000, and that the mother, having acquired the legal title, built a house upon it at a cost of $3,885, and that she and afterwards the defendant paid the taxes on the property and for repairs and insurance. *Held*, that, on the defendant conveying to each of the plaintiffs one undivided third part of the property, and on an accounting by the defendant for the rents and profits of the plaintiffs' shares of the property after the defendant obtained possession, the plaintiffs must contribute their proportionate part of the enhanced value of the common property due to the improvements made upon it by their mother, setting off against this their shares in the rents and profits during their mother's occupation after deducting the sums expended by her for taxes, repairs and insurance, but being allowed nothing in excess of the sum charged to them for improvements.

BILL IN EQUITY, filed April 25, 1904, by Andrew B. Sunter and Jennie B. Bolton, children of Andrew B. Sunter and Jane Sunter, against their brother William M. Sunter, praying that the defendant be ordered to convey to each of the plaintiffs an undivided third part of a certain parcel of real estate on Cottage Street in that part of Boston called Dorchester conveyed to the defendant by Jane Sunter, the mother of the plaintiffs and the defendant, who died on February 24, 1904, and for an accounting for all the rents and profits received from the real estate in question by Jane Sunter and the defendant.

In the Superior Court the case was referred to a master. Later the case was heard by *Sheldon*, J. upon the defendant's exceptions to the master's report. The report stated the following facts in regard to which there was no dispute:

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Andrew B. Sunter, the father, died intestate on June 24, 1886, seised of the land in controversy. He left a widow, Jane Sunter, and three children, the parties to this suit. At the time of his death all the children were minors and their mother was appointed their guardian by the Probate Court for Suffolk County.

Andrew B. Sunter came of age on July 9, 1893, Jennie B. Bolton on December 3, 1889, and William M. Sunter on August 25, 1896.

On June 6, 1887, by a decree of the Probate Court the guardian was licensed to sell the real estate in question for the maintenance of her wards and to invest the balance, if any, not needed for such maintenance, and gave bond therefor in the sum of $2,000 as required by the decree.

On September 2, 1887, Jane Sunter as guardian, by virtue of the license conveyed the land to one William L. Rutan, who immediately and on the same day reconveyed it back to her as an individual. In the deed from Jane Sunter to Rutan the consideration was expressed to be $2,000.

On December 24, 1903, Jane Sunter conveyed the land by a quitclaim deed to the defendant.

Jane Sunter died intestate on February 24, 1904, and no administration was taken out on her estate.

It appeared also that Andrew B. Sunter, the father, besides the land above mentioned and a small amount of money, about $200, left two policies of insurance on his life in the Vermont Life Insurance Company aggregating $5,000 payable to his wife, and that the company paid this amount to Jane Sunter on November 4, 1886; that Rutan acted as business manager for Mrs. Sunter after her husband's death; that he advised her to make the conveyance so that she would have a clear title to the land and then to erect a house upon it and thereby have a safe investment for her money; that acting on Rutan's advice she made the conveyance to herself through Rutan and subsequently built the house at a cost of $3,885; that Rutan did not pay $2,000 or any part of it, and that he was merely a conduit for the title to pass through; that after obtaining the title of the land and building the house, Jane Sunter lived in it at various periods of time; that all of the children went to work before

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they attained their majorities, and each contributed money to their mother out of their wages until they were married, and the two sons continued to do so after they were married.

The master found upon the evidence submitted to him that Jane Sunter did not sell this property for the maintenance of her wards, but on the contrary used it for her own benefit; that she never paid over to the wards any money as the proceeds of the land and that she never accounted with them or the Probate Court for the proceeds; and ruled that the transaction whereby she got the title thereto was improper and was voidable at the election of the plaintiffs.

He further found that the defendant gave no valuable consideration for the conveyance to him; that while he testified that he contributed money to his mother in accordance with his means, and lent her money to pay the taxes at one time, and himself paid the taxes for several years, none of these payments or loans were made as a consideration for the transfer to him. The master found from the defendant's own testimony that Jane Sunter conveyed the real estate to him out of mere gratitude for his kindness to and care of her in the past and his promise to care for her in the future. He found that Mrs. Sunter seemed to have acted with this property as if it were her own and did not appear to have realized at all that she was a trustee of the land for all of her children.

The deed to the defendant, which was under seal and recited a consideration of one dollar and other good and valuable considerations, contained the following clause: "but this conveyance is upon the condition, that the grantee, his heirs and assigns and all future owners of this estate, shall support the grantor for and during the term of her natural life." Mrs. Sunter was living with a friend at the time the deed was given, and she continued to live with this friend until her death. The defendant, though testifying that he was willing to support her, in fact did not support his mother from the date of the deed to her death. The master ruled that this clause in the deed did not constitute a valuable consideration so far as this suit was concerned, and found as a fact that the conveyance was voluntary, and that the defendant was not a purchaser for value nor without notice of the plaintiffs' equities in the land. He ruled

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that the deed to the defendant was voidable at the election of the plaintiffs.

The defendant contended that the plaintiffs after coming of age and with knowledge of the condition of the title of the property acquiesced therein and were estopped from maintaining this suit. The master found that no evidence was produced before him from which he could find any such acquiescence, and that on the contrary it appeared that the plaintiffs did not know until after their mother's death what she had done, and as the bill was filed about one month * after she died, there was no laches by the plaintiffs.

The master found that, although the deed to the defendant was not given until December 24, 1903, Jane Sunter promised to convey the property to him in October, 1902; that he moved into and occupied it in November, 1902, and had resided there ever since; that the rental value of the property was $42 per month, and that the defendant should be charged with two thirds of such rental value at that rate from November 1, 1902, until the date of the hearing, June 21, 1904, amounting to $560. The defendant excepted to the admission of evidence as to the rental value.

The master found that the defendant paid the taxes and insurance and made various repairs and improvements upon the property.

Attached to the report was a statement of the account as found by the master which showed that the defendant was indebted to the plaintiffs in the sum of $233.98.

The master ruled that, as Jane Sunter was dead and her estate was not a party to this suit, any payments made by her for the benefit of the property and all rent received by her should not enter into the accounting between these parties, and he accordingly excluded them.

He found that the plaintiffs Andrew B. Sunter and Jennie B. Bolton each were entitled to a conveyance of one undivided third part of the premises in controversy, and further were entitled to a judgment for the sum of $233.98.

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* It was about two months, namely from February 24, 1904, to April 25, 1904. See p. 450.

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The judge made the following final decree:

1. That the defendant's exceptions to the master's report are overruled, and the master's report is confirmed;

2. That the defendant at his expense and by a deed subject to the approval of the court forthwith convey to the plaintiffs, Andrew B. Sunter and Jennie B. Bolton, each one undivided third part of the premises described in the plaintiffs' bill;

3. That the defendant pay to the plaintiffs the sum of $233.98 with interest thereon from the date of the filing of the bill;

4. That the plaintiffs recover their costs in the sum of $25.15 of the defendant, and have execution for such damages and costs.

The defendant appealed.

M. J. Jordan, (*J. D. Graham*, with him,) for the defendant.

B. S. Ladd, (*T. F. Strange* with him,) for the plaintiffs.

BRALEY, J. Unless the defendant is a purchaser for value, and without notice of the infirmity of his mother's title, as against the plaintiffs he holds by no better right the land described in the bill. *Wyman* v. *Hooper*, 2 Gray, 141, 145. In equity the consideration must be valuable as distinguished from that which is merely moral or equitable, or imported from the nature of a sealed instrument, though it need not be pecuniary, or equal to the value of the property conveyed. *Bullock* v. *Sadlier*, Ambl. 764. *Patten* v. *Moore*, 32 N. H. 382. *Wood* v. *Robinson*, 22 N. Y. 564, 567. *Price* v. *Jenkins*, 5 Ch. D. 619. *Dean* v. *Anderson*, 7 Stew. (N. J.) 496, 508.

But if the defendant is found by the master to have neither paid money, nor parted with other property for her conveyance to him, he relies on a clause in the deed by which he agreed to support her during the remainder of her life.

This defence is devoid of merit, for it is shown in the report by the defendant's own testimony, that the conveyance was made out of gratitude for his care and kindness to her in the past, as well as upon his promise to care for her in the future, and during the few months elapsing between the date of the deed and that of her death she was not in fact supported by him though he expressed his willingness to have done so if required.

Upon these findings the master's final ruling that as between

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the parties the agreement to furnish her with maintenance could not be considered a valuable consideration, and that the conveyance being purely voluntary let in the plaintiffs to their equitable rights in the land, if they chose to assert them, was well warranted and must be sustained. *Dow* v. *Jewell*, 18 N. H. 340. *Padgett* v. *Lawrence*, 10 Paige, 170. The case is thus left to be considered as if the title had remained in her when as the probate guardian of the parties she personally acquired the estate through an intermediary at a sale made by herself acting in a fiduciary capacity.

While it is significant that the master finds although she was duly licensed to sell the property for the maintenance of her wards, in reality she sold and obtained title for her own benefit, yet if the purchase by her had been for a fair price, or to prevent a sacrifice of the land, the transaction equally would have been voidable by them. *Walker* v. *Walker*, 101 Mass. 169, 172. *Goodell* v. *Goodell*, 173 Mass. 140, 146. *Hayes* v. *Hall*, 188 Mass. 510.

A sale by herself officially to herself individually was not absolutely void, for if the wards upon coming of age, and with knowledge of the transaction had been content to let the conveyance remain unimpeached the title would have remained absolutely in her. *Jones* v. *Dexter*, 130 Mass. 380, 383. *Morse* v. *Hill*, 136 Mass. 60. But as the plaintiffs have elected to avoid, the defendant claims that the delay of which they have been guilty since attaining their majority shows their acquiescence, and the bill cannot be maintained. Until of age acquiescence could not be imputed, nor could they be affected by the uncommunicated knowledge of their mother and guardian that she had appropriated the property. *Denholm* v. *McKay*, 148 Mass. 434, 441, 442.

If a cause of action accrued entitling them to have the transfer set aside when she unlawfully acquired title, the plaintiffs were under the disability of infancy, and could not assert their right. Under Pub. Sts. c. 196, § 5, now R. L. c. 202, § 24, they had a period of ten years after reaching their majority in which to do so, but this time expired without any action being taken by them, because after attaining full age, and until their mother's death, the plaintiffs are found to have been ignorant of her

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conduct, though almost immediately upon such discovery they brought this bill. If in equity, or at law, the statute of limitations began to run when they ascertained the fraud that had been practised upon them, they are not thereby barred, and if in equity independently of the statute a delay had ensued which might have made the claim stale, and hence unenforceable, they are found to have exercised reasonable diligence. *Farnam* v. *Brooks*, 9 Pick. 212, 245. *Evans* v. *Bacon*, 99 Mass. 213, 215. *Sawyer* v. *Cook*, 188 Mass. 163. *Prevost* v. *Gratz*, 6 Wheat, 481. *Twin-Lick Oil Co.* v. *Marbury*, 91 U. S. 587, 592.

When their mother took possession the land was unimproved, and at her own expense she built thereon a dwelling house, the cost of which the defendant now claims should be allowed to him as an improvement, but the master in stating the account declined to allow the benefit of this expenditure, and the exception of the defendant to this ruling raises the most important and difficult question in the case.

At common law compensation was not awarded for improvements to the freehold even when made in good faith by one in possession claiming ownership, but who ultimately was found to have no title as against the true owner. *Russell* v. *Blake*, 2 Pick. 505, 507. *Marshall* v. *Crehore*, 13 Met. 462, 468.

But this doctrine, in many cases harsh and inequitable, was ameliorated by the St. of 1807, c. 75, now embodied in R. L. c. 179, § 17, and since this enactment where the land demanded has actually been held and possessed by the tenant, or his predecessor for six years, he becomes entitled to betterments whether annexed by himself or by a former occupant, or if this period of time has not passed, and where the improvements have been made in good faith by himself, or those who previously have occupied, then he may recover compensation therefor whether the title is put in issue by a writ of entry, or by petition for partition. Rev. Sts. c. 101, § 20. St. 1850, c. 278. R. L. c. 184, § 19; c. 179, § 18. *Bacon* v. *Callender*, 6 Mass. 303. *Marshall* v. *Crehore*, 13 Met. 462. *Plimpton* v. *Plimpton*, 12 Cush. 458, 467. *Butrick, petitioner*, 185 Mass. 107, 109.

If the plaintiffs had resorted to a writ of entry the defendant would have been entitled to the benefit of these provisions, but if instead they seek relief in equity the form of remedy does not

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change the right, as the protection which the statute affords is the same. *McSorley* v. *Larissa*, 100 Mass. 270, 272. *Billings* v. *Mann*, 156 Mass. 203.

Except for the limitation of time the statute is declaratory only of the general maxim that those seeking equity must do equity. Story Eq. Jur. § 799 a, b, note 1. *Williams* v. *Gibbes*, 20 How. 535.

The provision, that if it appears possession has been held by a title which the tenant had reason to believe good he then becomes entitled to compensation, is not applicable to the present case as the guardian must be presumed to have known that she was acquiring the estate of her wards, but where it appears that the betterment has been annexed either by the tenant, or those under whom he claims, and that either has actually held the land adversely to the true owner for six years previous to the bringing of the suit in which the ownership is put in issue the value of permanent improvements may be assessed. R. L. c. 179, § 17. *Baggot* v. *Fleming*, 10 Cush. 451. *Plimpton* v. *Plimpton*, 12 Cush. 458. *Wales* v. *Coffin*, 100 Mass. 177.

The conveyance of the guardian indirectly to herself was not an absolute nullity for it passed an estate to which she had the legal seisin, and if she had conveyed to an innocent purchaser for value he would have acquired an indefeasible grant as against the plaintiffs. *Somes* v. *Brewer*, 2 Pick. 184, 191. *Robbins* v. *Bates*, 4 Cush. 104.

If at their election, however, it was defeasible as to her, yet as she occupied under it for more than six years she held by a tenure that although it has now failed was altogether in her own right, and being adverse supports the defendant's claim for betterments. *Bacon* v. *Callender*, 6 Mass. 303. *Heath* v. *Wells*, 5 Pick. 140. See *Davy* v. *Durrant*, 1 DeG. & J. 535.

The implied or constructive trust which it is sought by the bill to have declared having been found to be established as of the date of the deed to herself, though by reason of the disability of infancy, and after that was removed, because of ignorance of the transaction, the filing of the bill was delayed, is the date to be taken as fixing the time when the plaintiffs' right accrued. If this is done the defendant will then receive in the right of his mother the full benefit of the betterments, while they will lose

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a corresponding right to an account of rents and profits, which she would have been obliged to have rendered, but this would be inequitable, for where those entitled to property held in trust are obliged to come into equity to recover their estate, it is generally held that they have a right to further relief by way of an accounting during the time it has been wrongfully withheld. *Teasdale* v. *Sanderson*, 33 Beav. 534. *Pickering* v. *Pickering*, 63 N. H. 468. *Hack* v. *Norris*, 46 Mich. 587. *Scruggs* v. *Memphis & Charleston Railroad*, 108 U. S. 368. *Mayer* v. *Murray*, 8 Ch. D. 424. *Strong* v. *Blanchard*, 4 Allen, 538. *Long* v. *Richards*, 170 Mass. 120.

Because of reasons previously stated, as the defendant succeeded to a voidable title, and as his claim for compensation arises by way of subrogation, which rests solely upon her expenditure, of which the plaintiffs must pay to him their proportionate part so far as it has permanently enhanced the value of the common property, upon equitable principles they are entitled also to set off their share in the rents and profits during the period of their mother's occupation after deducting therefrom their contributory part of the sum expended by her for taxes, repairs and insurance. But the amount of their counterclaim is not to be allowed in excess of the sum with which they are charged for improvements. R. L. c. 179, §§ 23, 24. *Raymond* v. *Andrews*, 6 Cush. 265, 269. *McMahan* v. *Bowe*, 114 Mass. 140, 148. *Stark* v. *Coffin*, 105 Mass. 328, 331, 332. *Backus* v. *Chapman*, 111 Mass. 386. *Brown* v. *South Boston Savings Bank*, 148 Mass. 300. *Canal Bank* v. *Hudson*, 111 U. S. 66, 83.

Upon restating the account accordingly, the error which was made in charging the defendant with rent before he became vested with the paper title is rendered immaterial.

Another exception relates to the admission in evidence of the rental value of the premises during the entire period elapsing between the time the house was built and that of filing the bill, but the admission of this testimony for the purpose of ascertaining the amount of rent with which the defendant should be charged after he obtained title was within the master's discretion, and it was for him to determine whether this evidence was so remote in point of time as to be of no value. *Peabody* v. *New York, New Haven, & Hartford Railroad*, 187 Mass. 489, 492.

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Nor is the remaining exception, that upon the avoidance of the guardian's sale the widow's right to dower in the land was restored, so that the defendant should not be held for rent during her life, well taken, for by reason of her death before this suit was instituted this claim not only was extinguished, but never having been assigned, even if revived upon the conveyance to herself being declared invalid, no estate in dower passed to the defendant. *Croade* v. *Ingraham*, 13 Pick. 33, 35. *Brock* v. *Rogers*, 184 Mass. 545. *Walker* v. *Walker*, 101 Mass. 169, 172.

We have thus considered all the exceptions argued, treating the others as waived, and because of the refusal of the master to charge the plaintiffs with their share of the increased value of the property due to the improvements, less their part of the net rents and profits, the exceptions relating to this question, as well as the exception concerning the defendant's accountability before he became seised must be sustained, and the report recommitted for the purpose of having this part of the account corrected and restated, but in all other respects the defendant's exceptions are overruled and the report confirmed.

Decree accordingly.

WILLIAM M. ROBINSON *vs.* FRANCIS A. DAYTON.

Middlesex. December 7, 1905. — February 28, 1906.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Probate Court. Practice, Civil. Guardian. Insane Person. Dower. Homestead Rights. Words, "Person aggrieved."

The heirs presumptive of one who is *non compos mentis* have a right to appeal from a decree of the Probate Court affecting the rights of property of the person *non compos*, being persons aggrieved within the meaning of R. L. c. 162, § 9.

On appeals from decrees made by a single justice affirming the action of the Probate Court, granting to the guardian of an insane widow a license to sell her right of dower and homestead at private sale to one who is a part owner of the fee of the land in question and authorizing the guardian to invest the entire property of the insane person in a mortgage given by the purchaser of the right of dower and homestead to secure the comfortable support and maintenance of the insane person during her life, if the appeals come before this court without findings of fact or a report of the evidence, the only questions open are as to the power of the Probate Court to make the decrees upon any evidence that might have been adduced under the petitions.

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The Probate Court may authorize the guardian of an insane widow to sell for her maintenance and support her dower and homestead rights in real estate to the owner of the fee although such rights have not been set off to her.

The Probate Court may authorize the guardian of an insane person who is a widow to sell her dower and homestead rights in real estate for her maintenance and support without first having her interest in her husband's estate ascertained, paid over and used for her maintenance, if her husband's estate is so small that the personal property may not be worth the necessary accounting.

The Probate Court may authorize the guardian of an insane woman, whose property is not more than enough to secure her a comfortable support during her life, to invest the entire property in a mortgage of real estate given by one of her sons conditioned to secure her comfortable support and maintenance during her life.

LORING, J. These are appeals by a son from two decrees made by a single justice affirming the action of the Probate Court. They come before us without findings of fact or a report of the evidence.

The first decree as modified and affirmed by the single justice grants a license to the guardian of an insane person to sell at private sale to one who is a part owner of the fee, the ward's right of dower and homestead, "which have never been set out" to her, for the sum of $706.56, "as it is necessary that her said interest be released or sold for her maintenance." The other decree authorizes the investment of the sum of $656.56 part of said $706.56, in a mortgage on land worth $2,000, conditioned for the comfortable support of the insane person, and, as a further consideration for the mortgage, the guardian is to release to the mortgagee the undivided interest of the insane person in her husband's personal estate.*

It was held in *Boynton* v. *Dyer*, 18 Pick. 1, that the heirs presumptive of one who is *non compos mentis* are persons aggrieved within St. 1817, c. 190, § 7, now R. L. c. 162, § 9, and so have a right to take an appeal. Different reasons have been given for

* It appeared by the decree, that the insane person was Bridget Dayton, and that the mortgagor was her son John B. Dayton. The investment was authorized to be made "in a first mortgage to be given by him on real estate owned by him situate in this Commonwealth of the value at least of two thousand dollars, conditioned to secure during her natural life, in sickness or in health, her comfortable support and maintenance, either at his own table and home or elsewhere as the said Bridget may choose." John B. Dayton also was the person to whom by the first decree the guardian was authorized to sell Bridget Dayton's rights of dower and homestead. The appellant was Francis A. Dayton, another son of Bridget.

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this decision, (*Harrington* v. *Harrington*, 13 Gray, 513, *Farrar* v. *Parker*, 8 Allen, 556,) but it never has been doubted. *Lawless* v. *Reagan*, 128 Mass. 592, 593. *Pierce* v. *Gould*, 143 Mass. 234. *Pattee* v. *Stetson*, 170 Mass. 93. *Leyland* v. *Leyland*, 186 Mass. 420.

Nothing can be open on these appeals but the power of the court to make the decrees upon any evidence that might have been adduced under the petitions.

Taking up the defendant's objections in the order in which they were argued, without regard to the reasons of appeal, we are of opinion if it was thought advantageous that the dower and homestead rights could be sold to an owner of the fee before they were set off. R. L. c. 145, § 26; c. 146, § 9; c. 148, § 4. See in this connection *Leavitt* v. *Lamprey*, 13 Pick. 382. In ascertaining the value of these rights the court would proceed on the basis that the widow was entitled to her dower and subject thereto to homestead, as is laid down in *Cowdrey* v. *Cowdrey*, 131 Mass. 186.

We are also of opinion that it was not necessary to have the interest of the insane person in her husband's estate ascertained, paid over and used for the maintenance of the insane person before the real estate could be sold. It may be that it was an interest which was not worth the necessary accounting.

The homestead right is in land to the value of $800, but it may have been that the dower and homestead interest of the insane person in this land was not worth $800. If the property of the insane person was not more than enough to secure to her a comfortable support during her life, the investment was a proper one.

Decrees affirmed.

J. E. Kelley, for the appellant.

R. E. Learned, for the appellee.

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SIMON ALEXANDER *vs.* VIE H. GROVER.

Suffolk. December 7, 8, 1905. — February 28, 1906.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Equity Jurisdiction, To redeem from equitable mortgage. *Trust. Equity Pleading and Practice. Estoppel. Bankruptcy.*

In a suit in equity to redeem real estate there was a finding of a master warranted by the evidence that a memorandum signed by the defendant acknowledged and declared that a conveyance of the real estate by the plaintiff to the defendant absolute in form was an equitable mortgage to secure certain indebtedness of the plaintiff to the defendant. In confirming a decree of the Superior Court founded on this finding this court declared that, even if there had been no memorandum of the trust, in accordance with the settled law of this Commonwealth it could have been shown on the oral evidence reported by the master that the conveyance although absolute in form was intended merely as security for a debt and the trust thus established.

An exception cannot be sustained to the ruling of a master in a suit in equity admitting certain evidence *de bene* upon the statement of the party offering it that it will contradict the testimony of a witness on the other side, if no motion afterwards is made to strike out the evidence.

A plaintiff is not precluded from maintaining a suit in equity, to redeem from an equitable mortgage real estate worth $18,000 which was conveyed by him to the defendant by a deed absolute in form but really as security for a debt of about $10,000, by the fact that the plaintiff in offering himself as a surety in a case pending in court testified that his property consisted of a billiard room and eleven tables and that his indebtedness did not exceed $50, or by the fact that he went into bankruptcy and made no reference in his schedules to his indebtedness to the defendant and no mention of the real estate or of any property held in trust for his benefit.

By an express provision of the bankruptcy act of 1898, § 70 f, upon the termination of proceedings by the confirmation of a composition offered by the bankrupt the title to his property revests in him.

Where real estate subject to a prior mortgage is conveyed by a deed absolute in form but really as security for a debt so that the effect of the transaction is an equitable mortgage, if the equitable mortgagee causes the prior mortgage to be foreclosed for the sake of clearing the title and purchases the property at the foreclosure sale and adds the amount thus paid by him to the indebtedness secured by the equitable mortgage, he stands no better than if he had paid off the mortgage and had it discharged, and cannot set up his title acquired at the foreclosure sale as a bar to a bill to redeem brought by the equitable mortgagor.

It is a wise exercise of discretion by a judge of the Superior Court sitting in equity, after a final decree has been entered and appealed from, to refuse to order a master to add to his report schedules filed by the plaintiff in bankruptcy proceedings, if the schedules are material only for the purpose of showing that certain property was not included in them, and this fact already appears in the report.

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BILL IN EQUITY, inserted in a writ in the Superior Court dated October 18, 1904, to redeem certain real estate from an equitable mortgage. The case is stated in the opinion.

J. J. Scott, (*W. F. Donovan* with him,) for the defendant.

W. Charak, (*H. J. Jaquith* with him,) for the plaintiff.

SHELDON, J. The plaintiff alleges in his bill that in January, 1902, he conveyed to the defendant his equity of redemption in two parcels of land and the buildings thereon, subject to mortgages amounting to $6,000, and situated one in Cambridge and the other in Quincy; that this conveyance though absolute in form, was really a conveyance in trust or equitable mortgage to secure the defendant for an existing indebtedness and for a new loan amounting together to $3,800, or $9,800 including the prior mortgages, and that the plaintiff was to have the right to pay off the loan, and thereupon to take back the property and have it reconveyed to him; and the defendant gave him a written memorandum to this effect, a copy of which is annexed to the bill; that by an error the total amount to be paid by the plaintiff to redeem the property was stated at $11,800; that in April, 1903, in violation of the trust existing, the defendant sold and made an absolute conveyance of the Cambridge property to a third party, its value being far in excess of the debt owed by the plaintiff to the defendant, and refuses to account to the plaintiff. And the bill prays for an accounting, that the defendant be charged with the fair market value of the property in Cambridge, and be ordered to reconvey to the plaintiff the property in Quincy. The defendant contends that the transfer to him was absolute in fact as well as in form, and that although there was a subsequent oral agreement for a reconveyance of the property for the sum of $11,800, the plaintiff refused to carry this out, and waived and forfeited all right thereunder.

The case was referred to a master, who made a long report, finding that the conveyance made by the plaintiff to the defendant was really made upon the trust claimed by the plaintiff; that the plaintiff owed the defendant $2,500, and the defendant advanced to him the further sum of $1,300, and that the prior mortgages on the Cambridge and Quincy estates amounted to $6,000; that all these items were reckoned by the parties to determine the total amount which the plaintiff should pay to the

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defendant to redeem the property, but owing to the fact that the defendant held two separate mortgages, one on land in Woburn, and one on the fixtures in a pool room in Boston, each for the sum of $2,000, to secure one sum of $2,000 which constituted a part of the plaintiff's prior indebtedness to the defendant, they counted both of these mortgages as if they had represented different debts instead of only one debt, and so made the total amount $11,800 instead of $9,800; and the defendant wrote this larger amount in the memorandum which he gave to the plaintiff; but that the plaintiff afterwards discovered this mistake, and explained it to the defendant, who thereupon drew his pen through the words "eleven thousand eight hundred," and wrote above them in ink the figures "9800"; and the master has found that the memorandum as thus changed conforms to the truth.

The master also found that the defendant sold the Cambridge property in March, 1903, for the sum of $12,500 to a purchaser, who immediately resold it for $2,000 more to another purchaser, to whom the defendant conveyed it. The master ruled that the defendant in taking the account between him and the plaintiff, was to be charged with the fair market value of the Cambridge property at the time of bringing the suit, and on widely varying testimony, largely from experts, has found that this value was $18,035. He also has charged the defendant with various small sums received by him, including the rents which he has received, or ought to be held liable for, and has credited him with the sum of $9,800, which includes the prior mortgages and the indebtedness due to him from the plaintiff, and with his payments for taxes, repairs, and for a foreclosure of the Quincy property which was apparently made to clear the title,* and with interest on all these items, and finds a balance due to the plaintiff of $6,958.77.

Both parties alleged numerous exceptions to this report; and the master, in obedience to an order made by the court, after-

* In January, 1902, immediately after the conveyance from the plaintiff to the defendant, the defendant took possession of the Quincy property, caused the prior mortgage to be foreclosed, and purchased the property at the foreclosure sale on August 9, 1902, by paying $500, the amount of the mortgage, and $65 for interest and expenses of foreclosure.

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wards filed, so far as he was able to do this, — the testimony not having been fully preserved, — the evidence taken before him as to the alleged trust and the market value of the estate in Cambridge. Thereafter, the plaintiff's exceptions apparently were waived; and the defendant's exceptions were heard, his second exception was sustained, and he was credited on the account with the additional sum of $556.46; and all his other exceptions were overruled. A final decree then was entered, reciting that the defendant was indebted to the plaintiff in the sum of $6,402.31, and ordering that execution issue therefor, and that the defendant convey the Quincy estate to the plaintiff by a good and sufficient deed. The defendant has appealed from the interlocutory decree overruling his exceptions to the master's report and from the final decree; and we proceed to consider the questions which he has argued before us, treating all others as waived.

He complains that the master erred in finding that the conveyance to him was made upon the trust contended for by the plaintiff. So far as this is a question of fact, we cannot doubt that the finding was a proper one and well warranted by the evidence before the master. Nor has the master found that the plaintiff did not assent to the memorandum signed by the defendant. The master's statement is that both parties testified that the first agreement prepared by the defendant was objected to by the plaintiff; and the defendant did testify that this memorandum was the first one drawn; but the plaintiff denied this, and testified that it was the second one drawn. And even if there had been no memorandum of the trust relied on, it would have been fully competent for the plaintiff to show by parol evidence that his conveyance to the defendant, though absolute in form, was really intended merely as a security for debt, and thereby to establish the existence of a relation of trust and confidence between the parties. This has been the settled law of this Commonwealth since the decision of *Campbell* v. *Dearborn*, 109 Mass. 130. See also *Clark* v. *Seagraves*, 186 Mass. 430; *Potter* v. *Kimball*, 186 Mass. 120; *Cullen* v. *Carey*, 146 Mass. 50; *Hennessey* v. *Connor*, 139 Mass. 120. And there was much parol testimony before the master, in addition to the memorandum which has been mentioned. Of course the stipulation that the plaintiff should have a reconveyance upon redemption was

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not inconsistent with his contention. Those exceptions which rest upon this ground cannot be sustained.

The defendant contends that the master erred in allowing the plaintiff to put in against the defendant's objection evidence of conversations which he had with one Thurston and one McNamee. But all that appears by the master's report is that some evidence of statements made by Thurston, who had been a witness for the defendant, was received *de bene* on the plaintiff's statement that they would contradict testimony which Thurston had given; and the matter was not again brought up. This exception cannot be sustained.

It does not appear, upon the facts reported by the master, that any of his findings as to the amounts to be allowed to the defendant for repairs were erroneous.

It appeared that in December, 1902, the plaintiff came before Mr. Jones, a master in chancery in Boston, and offered himself as a surety in a case pending in court, and testified under oath that his property consisted of a billiard room and eleven tables, and that his indebtedness did not exceed $50. In January, 1903, he went into bankruptcy, and made no reference in his schedules to his indebtedness to the defendant now in question, and no mention of the real estate in Cambridge or Quincy, or of any property held in trust by any one for his benefit. The defendant contends that the plaintiff is precluded by these facts from maintaining the bill. But it is well settled that these statements, though they are to be considered in determining the facts, cannot be regarded as creating any estoppel in favor of the defendant against the plaintiff. They were statements made *alio intuitu*, to other parties, never communicated so far as appears to the defendant or acted upon or intended to be acted upon by him. *National Bank of Commerce* v. *New Bedford*, 175 Mass. 257. *Hammond* v. *Abbott*, 166 Mass. 517. *Lincoln* v. *Gay*, 164 Mass. 537. And see *Rawson* v. *Plaisted*, 151 Mass. 71. The exceptions resting upon this ground must be overruled. It appeared that the bankruptcy proceedings had been terminated by the confirmation of a composition proposed by him; and accordingly the plaintiff's rights have not vested in a trustee in bankruptcy but are now vested in the plaintiff. U. S. St. 1898, c. 541, § 70 f.

The defendant cannot claim to hold an absolute title to the

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Quincy estate under the foreclosure of the first mortgage which was procured to be made. The indebtedness secured by this mortgage was included in the amount which the plaintiff was to pay to redeem the property. The defendant can stand no better than if he had paid off the first mortgage, and had it discharged.

The testimony as to the market value of the Cambridge estate was widely variant, and the views of the different experts were wholly irreconcilable. Thurston, one of the defendant's witnesses, testified that he bought this property for $12,500 and sold it for $14,500, but that its value was only $6,000. Considering all the testimony together in the light of the circumstances reported by the master, and giving full weight to the defendant's elaborate argument, we cannot say that his valuation of the estate was erroneous, although it may be that if he had found a smaller amount, we could not have disturbed such a result. It might have been contended that the defendant should have been charged with the value of the property at the time of his selling it rather than at the date of bringing the bill; but neither party has made any point as to this, and we do not consider the question.

The defendant also has appealed from an order of the Superior Court denying his motion, made after the final decree had been entered and appealed from, that the plaintiff's schedules in bankruptcy be reported to the court. In view of the fact that the defendant had, by the report itself, the full benefit of any argument he could base upon the contents of those papers, we think that it was a wise exercise of the discretion of the court to deny this motion.

We have now considered all the questions which have been argued by the defendant, and the result is that his exceptions to the master's report must be overruled and the decrees of the Superior Court which have been appealed from affirmed; and it is

So ordered.

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MARSHALL G. WHITEHOUSE *vs.* WILLIAM E. AIKEN.

Suffolk. December 8, 1905. — February 28, 1906.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Equity Pleading and Practice. Landlord and Tenant. Show Window.

On an appeal from a decree in equity without a report of the evidence the findings of fact made by the judge below are conclusive.

A lease of a store on the ground floor of a building on a city street, used by the lessee as an art store, with a show window the front of which is on the street and the side of which is on an open vestibule used as the entrance to a staircase leading to the floors above and controlled by the landlord, the side of the window on the vestibule being of much value to the lessee and having constituted a material element in fixing the amount of rent to be paid, gives the lessee the right to a full and unobstructed use of the window, and if the tenant of rooms on the second floor of the building under a license from the landlord places a show case in the vestibule so as to obstruct a full view of the lessee's window, the lessee has a right to remove the show case, and a bill in equity by the proprietor of the show case to enjoin its removal will be dismissed.

BILL IN EQUITY, filed in the Superior Court on February 11, 1905, by a dentist having rooms on the second floor of No. 493 on Washington Street in Boston, to enjoin the defendant from interfering with the plaintiff's placing a rectangular show case, with the permission of the owners of the building, in the vestibule used as an entrance to the stairway leading to the rooms of the plaintiff, and from tearing down and removing such show case when so placed.

In the Superior Court the case was heard by *Sheldon*, J., who made a decree dismissing the bill. The plaintiff appealed. The findings of fact by the judge, which are referred to in the opinion, were as follows:

"The plaintiff and the defendant are both tenants in the building numbered 491 and 493 Washington Street, Boston, under written leases from Stillman F. Kelly to them respectively, the plaintiff's lease being of the rooms numbered 1 and 2 on the second floor of the building, dated March 24, 1904, at the annual rental of $2,400, and the defendant's lease being of the store on the first or ground floor with the basement thereunder, and of the room numbered 26 on the fourth floor of said build-

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ing, dated July 14, 1903, at the annual rental of $6,100. Each of these leases was put in evidence, and is to be referred to. Other tenants occupy other rooms on the different upper floors of the building. The building is on the westerly side of Washington Street, and the staircase to the plaintiff's rooms and to the defendant's room on the fourth floor is on the southerly side of the building. The door of this staircase opens from an open vestibule used as an entrance to this staircase. This vestibule is four feet and five inches deep, seven feet and four inches wide on Washington Street, and seven feet and one inch at its rear. The doorway leading upstairs from this vestibule is three feet and ten inches wide. The defendant has occupied his store under his present and previous leases from Kelly as an art store for the sale of pictures, &c., for the last nine years. He has a show window on the northerly side of his store and another narrower one on its southerly side. This latter show window looks upon its front into Washington Street, and on its southerly side is about four feet deep and looks across the vestibule, and so southerly into Washington Street. This was the construction of the show window when the defendant took his present and each of his former leases from Kelly. The defendant uses this show window for the purpose of exhibiting his goods, and it is correctly described in the defendant's answer. The right so to use it is of much value to the defendant in carrying on his business in his store; and in view of the circumstances I am satisfied that this use by the defendant was contemplated by him and his lessor when he took his lease, and constituted a material element in the rental to be paid.

"The plaintiff's rooms are directly over the defendant's store. To advertise his business, the plaintiff constructed a show case, which is correctly described in his bill. He obtained the verbal permission of Kelly through his authorized agent to place this show case in the vestibule, so as not to interfere with the rights of other tenants. Then the plaintiff placed this show case in the vestibule against the defendant's show window, cutting away a part of the defendant's window sash to make it fit closely, and securing his show case by screws to the wood and iron work of the defendant's window; and the defendant removed it. The plaintiff now does not claim the right to secure it in this manner, but

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does claim the right to place it against the defendant's show window. I find that if this is done it will not substantially obstruct the defendant's right of passage from his store to his upper room, though it will slightly diminish the available space in the vestibule. It will slightly, but not materially, diminish the light coming into the defendant's store through this show window. It will materially diminish the value of the show window to the defendant for the purpose of exhibiting his goods therein and attracting the attention thereto of persons going in a northerly direction on Washington Street, and thereby will substantially diminish the rental value of his store."

W. H. Brown, for the plaintiff.

E. W. Philbrick, for the defendant.

BRALEY, J. This is a bill in equity to enjoin the removal of a show case belonging to the plaintiff, and which either has been affixed or placed by him in proximity to certain premises occupied by the defendant. In the Superior Court a decree was entered dismissing the bill, and the case comes here on the plaintiff's appeal, without a report of the evidence, but with certain findings of fact made by the presiding judge. Under the established practice these findings are to be considered as conclusive. *East Tennessee Land Co.* v. *Leeson*, 183 Mass. 37, 38.

It appears from the facts that both parties under written leases occupied rooms in different stories of the same building. The plaintiff, who was a dentist, had rooms on the second floor, while the defendant had an art store for the sale of pictures on the ground floor, with a room in the fourth story. A common stairway which terminated in an open vestibule at the street entrance led to the upper rooms. To advertise his work, and to attract patients the plaintiff, with the verbal permission of the lessor, placed in the vestibule a show case so located as to obstruct a full view of the window on the premises of the defendant, which was used by him because it faced the vestibule, to display his goods for the purpose of attracting customers. In placing the show case a part of the window sash was cut away, and it then was fastened by screws to the wood and iron work of this part of the building, but at the trial any right so to fasten it was abandoned. It was still contended, however,

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that the case should remain in position on the floor, although it is found that such use will materially diminish the value of that part of the defendant's estate by interfering with a full view of the window by persons upon the street, and so will appreciably impair the rental value of the store.

If the defendant's demise included a full and unobstructed use of the window, placing the show case in the manner described was a trespass, and its removal lawful.

By the terms of the lease the premises are described "as the store numbered 491 Washington Street, with the basement under the same, and the room numbered 26 on the fourth floor of the building numbered 493 Washington Street, known as the 'Blake Building.'" This description left the vestibule and stairway in the possession and control of the lessor. *Marwedel* v. *Cook*, 154 Mass. 235.

But it is expressly found that the window is of much value for advertising his wares, and "this use by the defendant was contemplated by him and his lessor when he took his lease, and constituted a material element in the rental to be paid." By the construction of the building evidently such an arrangement must have been intended for the use of whoever occupied the store as a tenant. *Case* v. *Minot*, 158 Mass. 577. And this is tantamount to a finding that the beneficial use of the premises described, and leased as a store, required that a view of the window should not be obstructed permanently, and hence this incorporeal right passed by implied grant as a part of the demise. *Salisbury* v. *Andrews*, 19 Pick. 250, 255. *Dexter* v. *Manley*, 4 Cush. 14.

The plaintiff having failed to establish his allegation of title, the decree dismissing the bill must be affirmed.

So ordered.

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CHARLES B. FILLEBROWN & others, trustees, *vs.* KEZIA W. HAYWARD & another.

Suffolk. December 8, 1905.—February 28, 1906.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Corporation. Bills and Notes, Holder in good faith.

The directors of a Massachusetts corporation, in the absence of a by-law or a vote of the stockholders restricting their power, have authority to establish a reasonable salary for the services of the treasurer of the corporation.

A vote of the directors of a Massachusetts corporation fixing the salary of the treasurer of the corporation, if the directors in good faith regard the salary as a fair compensation for the services and there is no purpose to appropriate corporate profits unlawfully under the guise of a salary, is not invalidated by the fact that the board of directors that passed the vote consisted of three persons of whom one was the treasurer and another the treasurer's daughter.

A woman, the treasurer of a Massachusetts corporation of which she also was a director and the largest stockholder, resigned as treasurer and director and sold all her stock in the corporation to a person who for two years had been associated with her as director and who became her successor as treasurer of the corporation. He paid her for the stock partly in cash and partly in promissory notes payable one in each month for a period of five years. For a period of three years and a half these notes were paid as they fell due by checks of the corporation signed by the treasurer in that capacity, payable to him individually and indorsed by him to the former treasurer from whom he purchased the stock. The checks were received in good faith. The maker of the notes, after his purchase of the stock, acted not only as treasurer but also as president and general manager of the corporation. His management was bad, and the profits of the corporation rapidly fell off and were turned into large and increasing losses. The corporation became bankrupt and its treasurer absconded. The trustees in bankruptcy of the corporation brought a bill in equity against its former treasurer to compel repayment of the sums received by her from the checks given in payment of the notes of the absconding treasurer. The judge who heard the case found that the defendant took the checks in good faith, and made a decree in her favor. *Held*, that the decree must stand; that the question of the good faith of the defendant in taking the checks was one of fact, and that a finding was warranted that the defendant had sustained the burden of showing that she was a holder in good faith and for value.

BILL IN EQUITY, inserted in a writ of the Superior Court dated May 4, 1904, by the trustees in bankruptcy of the Cable Rubber Company, a corporation organized under the laws of this Commonwealth, against Kezia W. Hayward of Ponkapog, the former treasurer of the Cable Rubber Company, formerly holding and controlling a majority of the capital stock of that com-

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pany, and William J. Cable of Boston, praying for an order to compel the defendant Hayward to pay to the plaintiffs certain sums of money alleged to have been taken by the defendant Cable from the Cable Rubber Company and paid to her.

In the Superior Court the case was heard by *Sheldon*, J., who made a decree that the plaintiffs were not entitled to recover from the defendant Hayward on any of the grounds alleged in their bill, except the sum of $1,192.83 paid to that defendant as salary after her resignation as treasurer, and that as to the defendant Cable, on whom no service had been made, the bill should be dismissed without prejudice. The plaintiffs appealed.

The averments in the first, second and third paragraphs of the bill were in substance as follows:

1. That on October 20, 1903, a petition in bankruptcy was filed against the Cable Rubber Company, that on November 18, 1903, that company was adjudicated a bankrupt, and on December 1, 1903, the plaintiffs were appointed its trustees in bankruptcy.

2. That the defendant Hayward was on and before May 27, 1897, a very large stockholder in the Cable Rubber Company, owning or controlling six hundred and fifty-four shares of the company, and holding as trustee for her son and daughter one hundred shares more, making a total of seven hundred and fifty-five shares held by her and her family out of a total capitalization of one thousand shares; that the defendant Hayward was also at that time a director in the company, the other director being Wheeler Cable; that on May 27, 1897, the defendant William J. Cable was elected a director and the defendant Hayward was elected treasurer; that at a directors' meeting held on the same day, it was voted that the treasurer's salary be $2,000 per annum, commencing on June 1, 1897; that at a directors' meeting held on January 31, 1898, it was voted that the treasurer's salary be $3,000 per annum for the year 1898; that the directors at this time were, Wheeler Cable, the defendant Hayward and the defendant Cable; that on January 18, 1899, the stockholders at a meeting held in Boston, elected as directors, the defendant Cable, the defendant Hayward and Theodora L. Hayward for the year 1899, Theodora L. Hayward being the daughter of the defendant Hayward; that at a directors' meet-

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ing held on the same day, at which the defendant Cable was temporary chairman, it was voted that the treasurer's salary be $4,000 for the year 1899.

8. That on September 18, 1899, the defendant Hayward, who from the date of her election had held the position of treasurer, tendered her resignation as treasurer of the company which was accepted by the directors on that day.

The findings of fact by the judge were as follows:

"I. At the hearing before me, the averments of the first, second and third paragraphs of the plaintiffs' bill were either proved or admitted.

"The defendant, Mrs. Hayward, during her term of service as treasurer of the Cable Rubber Company, devoted a large part of her time to the performance of her official duties. She succeeded her deceased husband as treasurer after his death in May, 1897. The corporation was at that time in a prosperous condition, doing a profitable business, and this state of affairs continued until after she sold her stock to William J. Cable and resigned her office. She had been a director of the corporation before her husband's death. He was one of the founders of the corporation, had always managed its business and looked after its finances; and its success was mainly due to his skill and energy. She had been accustomed to follow the business with him, going over many details and conferring with him in the evenings and outside of business hours. While she herself was treasurer, she intended to attend to all the business connected with the financial affairs of the corporation, and to use for this purpose whatever time and effort might be necessary. She went into the office every morning at about eight o'clock, or soon after, except during the months of July and August, when her visits were less frequent, and stayed through the whole or most of the forenoon and sometimes a part of the afternoon, went over the mail, looked through orders, received reports from the factory, kept track of prices, conferred with the bookkeeper, signed the necessary checks that were drawn by him, examined the reports sent in by managers of branch stores which were maintained and run for the corporation through managers and subordinate companies. Her salary was as stated in the bill, being increased from time to time as therein averred. I find that her

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compensation at the rate of $4,000 per year was somewhat in excess of the fair value of the services rendered by her; but I also find that the corporation was at that time prosperous and thriving and its business was a profitable and growing one, that her salary did not exceed what she honestly regarded as the fair value of her services, and no officer, stockholder or creditor of the corporation objected to its amount; that the amount of her salary was at each change fixed honestly and in good faith without any collusion or unfair practice between herself and William J. Cable or any one else; and that all the payments which she as treasurer made to William J. Cable were made in perfect honesty and good faith and in the exercise of proper and reasonable care on her part; and that the plaintiffs are not entitled to compel her to refund any part of the amount received by her as salary up to the date of her resignation, or of the payments made by her as treasurer to William J. Cable. Indeed, the plaintiffs did not claim at the hearing to recover anything from her by reason of the payments made by her to William J. Cable.

"In September, 1899, she sold all her stock to William J. Cable for the sum of $50,000, being a little over $66 per share. This was the price named by her, and was a fair price; if anything it was less than the fair value of the stock at that time; and said William J. Cable was so anxious to carry this trade through that he procured to be paid $3,500 to Mr. Edmund H. Talbot for obtaining for him a loan from a national bank upon a pledge of the stock to enable him to make the cash payment which Mrs. Hayward required. This arrangement was made; Mrs. Hayward transferred her stock to Cable; he paid her the sum of $30,000 in cash, and gave her also sixty notes, each for the sum of $333.33, and payable at regular intervals of one month, beginning in January, 1900. It was one of the terms of this bargain that he should pay her salary for the residue of the year 1899. He did not do this; but the corporation did so, and she received the amount, being the sum of $1,133.33 from the corporation, knowing that it came from the corporation, by its checks, drawn to her order, and without giving any equivalent therefor, as she knew. I find that the plaintiffs are entitled to recover this amount from her, with interest from May 9, 1904, the date of the filing of the bill.

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"II. After Cable had bought Mrs. Hayward's stock as aforesaid, he acted as president, treasurer and general manager of the corporation, and had full charge of its business and affairs with the acquiescence of the other directors, at a salary of $5,000 per year. He managed all the affairs of the corporation, apparently having full authority over them; and Mrs. Hayward, after her resignation, on September 18, 1899, had no knowledge or information as to the same which has any bearing upon the questions involved in this bill. Cable's management of the business was bad; the profits fell off rapidly and were turned into large and increasing losses; and the corporation finally became bankrupt as averred in the bill. Cable never drew his salary as such; but an account was kept with him on the books of the corporation, and he was accustomed to draw sums from time to time in the following manner: Whenever he had occasion for money, he caused a check to be drawn, payable to himself individually, and he signed it as treasurer. He then, in the numerous cases in which he did not himself draw the amount of the check, indorsed it to whatever individual creditor of his own he wished to pay. He himself kept no bank account, and practically paid all of his bills in this way. And on or after the first day of each month, beginning in January, 1900, he caused in this same way the check of the corporation for $333.33 to be drawn payable to himself individually, signed it as treasurer, indorsed it individually to Mrs. Hayward, and sent it to her by mail; she received it, collected it, and sent to him the note coming due that month. And in this way she received from him payment of his notes coming due to her each month except one from January, 1900, to and including June, 1903, being the total amount of $13,666.53. The total amounts so drawn by Cable and paid to her and his other creditors and to himself were properly charged to him on the books of the corporation. They exceeded each year and each month the amounts respectively accruing due to him from the corporation. These accounts were openly kept, were never in any way concealed from any one interested in the corporation; and Mrs. Hayward received the checks so sent to her in good faith, without noticing their form and without any actual knowledge that he obtained the sums so sent her from the corporation. The amounts of all these checks were charged to

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Cable on the books of the corporation as aforesaid. There is no evidence by which I can determine which ones, if any, of the sums so drawn by Cable constituted overdrafts. He absconded soon after the failure of the corporation, and neither party has been able to procure his testimony. At the end of each year, he caused his account to be apparently balanced by crediting 'Expense' with the total amount of the charges against him. Four or five of the checks so received by Mrs. Hayward were drawn to the order of George F. McDonald the bookkeeper of the corporation, and either indorsed by him to Cable and by him to Mrs. Hayward or directly by McDonald to her; and one check was drawn directly to her own order; but the facts as to these checks and the sums that they represented are exactly the same as already stated with reference to the checks in general. I find that the plaintiffs are not entitled to recover from Mrs. Hayward any of the sums which she thus received from Cable in payment of his notes to her; that these funds when she received them were not the property of the corporation, but were the property of Cable individually."

For the purposes of the appeal, it was agreed that the facts set forth in Paragraph I. of the foregoing finding of facts and memorandum should be taken to be true; and that the facts as found and set forth in Paragraph II. should be taken to be true, except so far as the same might be modified or reversed by the evidence printed from the report of a commissioner appointed under Chancery Rule 85.

In the opinion the defendant Hayward is called the defendant, the defendant Cable not being before the court.

G. W. Anderson, (*W. A. Rollins* with him,) for the plaintiffs.

A. Hemenway, (*W. S. Pinkham & J. W. Farley* with him,) for the defendant Hayward.

BRALEY, J. In accordance with a stipulation of the parties the findings of fact in the first paragraph are to be taken as true. If so, it follows that during a period of nearly two and one half years in which the defendant was treasurer of the corporation her salary was increased annually by vote of the board of directors, until it reached an amount which the plaintiffs contend was largely disproportionate to the value of any services rendered. But if the amount of compensation compared with

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her actual duties seems to be unduly large, yet it is stated in these findings that she and the directors acting in good faith regarded the salary as a fair valuation of her services to the company, which during this time was doing a profitable and extensive business. Being a domestic corporation, and no vote of the stockholders or by-law appearing which limited their power, the directors had authority to establish a reasonable salary for the services of the treasurer. Pub. Sts. c. 106, § 23. *Tripp* v. *Swanzey Paper Co.* 13 Pick. 291. *Von Arnim* v. *American Tube Works*, 188 Mass. 515.

That she was a member of the board, which also included her daughter, would not invalidate its action, for there is no evidence of any purpose to appropriate corporate profits unlawfully under the guise of salary, the abstraction of which would impair either the solvency of the company, or the right of minority stockholders to a reasonable division of surplus earnings in dividends. *Gay* v. *Fair*, 175 Mass. 521, 527. *Von Arnim* v. *American Tube Works*, *ubi supra*.

If the money thus obtained had been taken wrongfully, the corporation, or upon its bankruptcy the plaintiffs, could recover back any excess beyond such sum as would have afforded a reasonable remuneration during the time she performed the duties of the office. But as no fraud, actual or constructive, is found, and the transaction was entered into honestly, the defendant is not obliged to make any reimbursement. *Fort Payne Rolling Mill* v. *Hill*, 174 Mass. 224. *Marlborough Association* v. *Peters*, 179 Mass. 61. *King* v. *Cram*, 185 Mass. 103, 104.

The question, however, of most consequence remains for consideration, concerning which the stipulation further provides that the facts set forth in the second paragraph of the findings are to be deemed true, unless modified or reversed by the evidence which has been reported on this part of the appeal. Unless plainly wrong these findings are to be considered as conclusive. *Skehill* v. *Abbott*, 184 Mass. 145, 147.

After the period of service had expired to which reference already has been made, the defendant having resigned her offices as treasurer and director sold her stock in the corporation to one Cable, who then was not only treasurer and presi-

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dent, but with the acquiescence of the directors also acted as manager of the corporation with a general control of its affairs.

If thereafter there was any failure on the part of the board of directors properly to discharge the functions of their office this delinquency is not shown to have been brought to the knowledge of the defendant.

Upon the purchase of this stock Cable made a large money payment and gave her his promissory notes for the balance, so divided that one of them should mature at the beginning of each month for a period of five years.

It was undisputed that upon these notes as they severally matured at least the sum of $13,000 was paid by checks drawn by him from time to time on the treasury of the corporation. The books of account disclose in detail the number and amount of these checks, and a balance was always struck by crediting as expense a lump sum sufficient to offset the debit items.

In his dealings, although in a few instances he caused the checks to be made payable to the order of the bookkeeper who indorsed them either to himself or to the defendant, and upon one occasion the check was made payable directly to her order, this course of dealing was uniformly followed. An examination properly conducted would have shown that when these monthly payments were received as between Cable and the company his account would have appeared to have been constantly overdrawn, but the defendant had no actual knowledge of this condition of affairs, or that the money she was receiving came clandestinely from the corporation rather than lawfully from him. The plaintiffs strenuously contend that notwithstanding this, the form of the checks should have suggested to her that he was misappropriating the funds of the company, and therefore she should be charged with constructive notice that he was using corporate assets for the payment of his maturing notes.

The early doctrine on this subject so far as it relates to negotiable paper is found in *Ayer* v. *Hutchins*, 4 Mass. 370, 372, and in *Thompson* v. *Hale*, 6 Pick. 258, 261, where it is said that circumstances which ordinarily would excite the suspicions of a reasonably prudent and careful man were sufficient to put the party receiving negotiable paper not overdue upon his inquiry

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as to suspicious defects or infirmity of title in the prior holder. See also *Cone* v. *Baldwin*, 12 Pick. 545, 546.

The rule thus formulated gave way later to what has been called the modern doctrine, that neither knowledge of suspicious circumstances, nor doubts as to the genuineness of the title, nor gross negligence on the part of the taker either singly or together are sufficient to defeat the holder's recovery, unless amounting to proof of want of good faith. *Smith* v. *Livingston*, 111 Mass. 342. *Freeman's National Bank* v. *Savery*, 127 Mass. 75, 79. *Boston Steel & Iron Co.* v. *Steuer*, 183 Mass. 140. *Massachusetts National Bank* v. *Snow*, 187 Mass. 159. *Goodman* v. *Harvey*, 4 Ad. & El. 870. *Murray* v. *Lardner*, 2 Wall. 110. *Hotchkiss* v. *National Banks*, 21 Wall. 354. *Lytle* v. *Lansing*, 147 U. S. 59. *Jones* v. *Gordon*, 2 App. Cas. 616, 628, 629. See also *Jones* v. *Smith*, 1 Hare, 43.

At the time the first note of the series matured and the first check in payment was given the St. of 1898, c. 533, commonly known as the negotiable instruments act, now R. L. c. 73, had become operative. By § 56 of the original act, now § 73 in the revision, the common law rule shown by these decisions relating to implied notice to the purchaser for value of negotiable paper of a defect in the title of a previous owner was codified. The plaintiffs, therefore, cannot recover the proceeds of the checks unless the defendant took them in bad faith, and this inquiry is a question of fact. St. 1898, c. 533, § 56. *First National Bank of Chelsea* v. *Goodsell*, 107 Mass. 149. *Smith* v. *Livingston*, 111 Mass. 342. *Freeman's National Bank* v. *Savery*, 127 Mass. 75. *Spaulding* v. *Kendrick*, 172 Mass. 71.

If each check was signed by him as treasurer this of itself was not such an affirmative representation as to indicate that he was acting in a fiduciary capacity by which his authority was restricted and limited, as authority to draw and issue checks in the name of the corporation was incidental to his office, and the holder in due course of business would receive them under a presumption that they were issued lawfully. *Shaw* v. *Spencer*, 100 Mass. 382, 393. *Merchants' National Bank* v. *Citizens' Gas Light Co.* 159 Mass. 505, 507. *O'Herron* v. *Gray*, 168 Mass. 573. Compare *Kneeland* v. *Braintree Street Railway*, 167 Mass. 161, 162.

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While the defendant may be held to have known that by purchasing her stock Cable had acquired control of the corporation, there does not appear to have been any reasonable ground for an assumption on her part that its business under his management was not profitable, or had been impaired and then ruined, until the company's assignment for the benefit of its creditors was announced. Before her retirement for at least two years they had been associated in conducting its business affairs, and neither during this period nor after her withdrawal is it shown that there was anything in his conduct indicating to her that he was dishonest or incompetent. There was therefore no reason why she should not have retained her confidence in him, and even if her former experience had made her familiar with the duties of the office which he held, it could be found that she received the checks without realizing the possible fact that notwithstanding their form they were drafts upon the funds of the company in payment of her own debt.

It is more than probable that as note after note matured and payments were made in this manner she gave no thought to the general transaction except to get her pay, but, if so, she still may have inferred that the money so appropriated was in payment of his own salary, or otherwise was being withdrawn lawfully. See *Fay* v. *Noble*, 12 Cush. 1, 16, 17. But while she may have been incautious and unsuspecting where others more accustomed to mercantile affairs might have been mistrustful, there is no evidence that at any time she was possessed of any knowledge of what undoubtedly to a certain extent was an embezzlement on his part, or that, having doubts as to how he obtained the money, she deliberately decided for her own advantage not to make any inquiries to ascertain why instead of paying with checks drawn on a bank account of his own, or in money, he used checks issued by him as treasurer, although if such conduct had been shown then it might be inferred that she ignored significant facts with a purpose to know anything more, and this would have been enough to indicate that suspecting something was wrong, she intended to avoid the effect of the evidence. *Kettlewell* v. *Watson*, 21 Ch. D. 685, 706.

But having taken before maturity for a valuable consideration negotiable paper which was regular upon its face, without knowl-

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edge of any defect in the title, even if there might have been some circumstances which would have raised doubts in the mind of a more prudent person, the defendant's right to retain the proceeds of the checks cannot be divested without proof that she knew, or in the face of facts sufficient to put her upon inquiry purposely refrained from knowing of the fraud of Cable; although if obliged to bring suit upon the checks, after evidence had been introduced in defence that they had been fraudulently issued, the burden would have remained upon her to prove that she was a holder in good faith and for value. *Bill* v. *Stewart*, 156 Mass. 508. *Massachusetts National Bank* v. *Snow*, 187 Mass. 159. *Holden* v. *Phœnix Rattan Co.* 168 Mass. 570. *Tatam* v. *Haslar*, 23 Q. B. D. 345.

While the form of procedure does not change this rule, we fail to find anything in the evidence reported sufficient to modify or overcome the conclusions of fact reached by the trial court, which determined that the defendant had sustained this burden.

Decree affirmed.

GEORGE A. DARY, trustee, *vs.* ANNIE S. GRAU & others.

SAME *vs.* EMMA A. DILLON & others.

SAME *vs.* DANIEL B. STEDMAN, 2D, & others.

Suffolk. December 8, 1905. — February 28, 1906.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Devise and Legacy, Construction. *Words*, "My surviving sons or daughters."

Where there is a gift by will to the children of the testator for life, providing that as each child dies the share of the child so dying shall go to the issue of that child or if the child has left no issue to the surviving sons and daughters of the testator, the surviving sons and daughters are those who survive the beneficiary for life who has died without issue, unless this ordinary meaning of the words is controlled by the context.

A testatrix directed that, after a life interest in her husband, the residue of her estate should be distributed into nine equal parts. Two parts she gave to two sons outright. Another ninth part she gave to four grandchildren, the children of A. who had married successively two daughters of the testatrix, one the mother of one of the four grandchildren and the other of the other three, and

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both dead. The remaining six parts she gave in trust to distribute to her six other children, one son and five daughters, naming them, and on the decease of each of them, leaving issue, to give the share of which the child so dying received the income to the issue of that child, but on the decease of any of her said six children "without leaving issue then the share of said trust property with all accumulation thereon so devised for the use of such son or daughter so dying without issue, shall be held by my trustees aforesaid for the use of my surviving sons or daughters to be equally divided between them and the shares devised in trust are to be held upon the like trusts and purposes herein already before declared and finally to be conveyed, divided and distributed among their issue as herein before provided." The last surviving child of the testatrix died without leaving issue. On her death the trustee under the will brought a bill for instructions. There were issue living of four children of the testatrix who had survived her. There also were issue living of the two daughters of the testatrix who had died before her, the successive wives of A. One of the sons of the testatrix who survived her had died testate without leaving issue. *Held*, that the property was to be distributed *per stirpes* among the issue of the four children of the testatrix who survived her and left issue.

THE following statement of these cases is taken from the opinion of the court:

These are three appeals from a decree of the Probate Court on a bill brought by the present trustee under the will of Miriam W. Stedman, asking for instructions as to the final distribution of the trust estate.

Miriam W. Stedman, by her last will and testament, after giving three legacies (which appear to have been small in value), bequeathed and devised all her personal and real estate to her husband for life, and subject thereto she directed it to be divided into nine equal parts. Two parts she gave absolutely and in fee to her two sons Daniel B. and George; and she gave another ninth to four grandchildren by the name of Atkins, being children of the same father who had successively married two daughters of the testatrix, and who had had by his first wife one child and by his second wife three children, both wives then being dead. The remaining six parts were given to her husband and her two sons Daniel B. and George, "in trust . . . to pay over and distribute the nett proceeds of such rents, income, dividends and interest to and among my children hereinafter named, to wit, Josiah Stedman, Junior, Miriam W. Priest, Hannah M. Jackson, Lucy Stedman, Henrietta Stedman and Clarissa S. Bates in equal shares or portions. . . . In trust further upon the decease of my said son Josiah Stedman Junr. and of my said daughters as the same shall happen in the order

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of Providence leaving issue then to grant, surrender and convey to such issue their heirs and assigns forever the said share or sixth part of which the parent received the income as aforesaid to be equally divided among such issue, share and share alike but in the event of the decease of my said son Josiah Stedman Jr. or either of my aforesaid daughters without leaving issue then the share of said trust property with all accumulation thereon so devised for the use of such son or daughter so dying without issue, shall be held by my trustees aforesaid for the use of my surviving sons or daughters to be equally divided between them and the shares devised in trust are to be held upon the like trusts and purposes herein already before declared and finally to be conveyed, divided and distributed among their issue as herein before provided."

The testatrix died in 1862 and her husband in 1867. The plaintiff became sole trustee of the trust property in September, 1876. Clarissa was the survivor of the six life tenants, and died in May, 1904, without leaving issue. On her death the bill in question was brought for instructions as to the final distribution of the trust estate.

By a decree of the Probate Court dated June 15, 1905, it is declared that "Daniel B. Stedman the elder, Miriam W. Priest, Henrietta S. Alleyne, and Hannah M. Jackson, all deceased, were the only children of the testatrix who survived her and left issue surviving the said Clarissa S. Stedman." After further findings, the decree directs the estate to be divided into four equal parts; one part for the issue of Daniel B., who left five sons and two children of a deceased son; one part for the issue of Miriam W. Priest, to be divided into three parts, one for each of her two sons and one for the daughter of a deceased daughter; a third part for the issue of Henrietta S. Alleyne, namely, her daughter Arabella Von Schrader; and the fourth part into two equal parts for the two daughters of Hannah M. Jackson. The decree then directs that the estate shall be distributed and conveyed accordingly, except that the shares of Daniel B. the younger and Josiah, two sons of Daniel B. the elder (son of the testatrix), both of whom became bankrupt in 1877, were to be conveyed to an assignee in bankruptcy; and the share of George Stedman, another son of Daniel B. the

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elder, who became insolvent in 1896, was to be paid to his assignee in insolvency.

From this decree there were three appeals. One was taken by Annie S. Grau and others claiming under the will of George Stedman (son of the testatrix), who died testate without leaving issue. These appellants are entitled under his will if this property passed under it. Another appeal was taken by Emma Dillon and others, the issue of the two daughters who married Mr. Atkins, and who claim that the trust estate should be divided among all the issue of the testatrix and not among the issue of the eight children to whom the share of the life tenants dying without issue was given, provided they survived the life tenant so dying. The third appeal was taken by a guardian *ad litem* in behalf of great-grandchildren and minors and unascertained issue, who claimed that the distribution should be *per capita*.

It appears from the *testimonium* clause of the will that the words "to be equally divided between them and the shares devised in trust are to be held" were interlined. And it appears from the agreed facts filed in this court that the letter "s" in the word "sons" was written when the words interlined were written in.

The cases are here on a reservation made by a single justice upon the pleadings and agreed facts.

G. A. Dary, trustee, *pro se*.

H. K. Brown, for Annie S. Grau and her issue.

H. G. Vaughan, for Emma A. Dillon and others.

R. W. Foster, guardian *ad litem*, for Daniel B. Stedman, 2d, and others.

C. E. Grinnell, for Susan L. Stedman.

F. T. Hammond, for Miriam S. Smith.

B. S. Ladd, for Miriam P. Adams.

LORING, J. [After the foregoing statement of the case.] The contention of the appellants in the first appeal is that unless the gift over to "my surviving sons or daughters" is to be construed to mean sons and daughters who survive the testatrix, there is an intestacy in the event which has happened, namely, the surviving life tenant's dying without leaving issue. But in our opinion this gift over to surviving sons and daughters is a

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gift to the sons and daughters who survived the several life tenants as they respectively deceased, and that in the event now before us there is no intestacy.

Where there is a gift to children for life, and, as each child dies leaving issue, a gift of the share of the child so dying to the issue of that child, with a gift over to surviving sons and daughters of the testatrix if the life tenant dies without issue, the surviving sons and daughters are the sons and daughters who survive the life tenant who dies without issue. This is usually the meaning of these words. *Lawrence* v. *Phillips*, 186 Mass. 320, and cases cited. Of course it may be overcome by the context, as in *Stone* v. *Bradlee*, 183 Mass. 165, and other cases cited in *Lawrence* v. *Phillips*, 186 Mass. 320, 322. But there is nothing in the context here to overcome the ordinary meaning. In our opinion the gift over to "my surviving sons or daughters" means to my sons and daughters who survive the life tenant in question who dies without issue.

The argument of these appellants is that the last clause, "and finally to be conveyed, divided and distributed among their issue as herein before provided," does not dispose of the trust estate which is not disposed of by the previous provisions of the will, because there are in the event in question *ex vi termini* no surviving sons or daughters of the testatrix, and there is no previous gift to issue of surviving sons and daughters to whom "herein before provided" can refer.

But this is too literal. It is true that there are in the event in question no surviving sons or daughters. But the gift is to the issue of the sons or daughters of the testatrix who, as they did or did not survive the several life tenants (their brother or sisters), did or did not take the shares of those life tenants who died without leaving issue. It also is true that there is no gift to such issue, but there is a previous provision as to the terms on which issue are to take, when issue take, and, in the gift here in question "to their issue," they are to take as it is "herein before provided" that issue are to take when issue take. The clause in question manifestly was inserted to cover the very contingency which is now before us. The testatrix gives the six parts of the residue put in trust to her son Josiah and his five sisters for life, with a gift over of each share to the issue of

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the life tenant in question on the decease of that life tenant if he leaves issue, followed by a gift over to all surviving brothers and sisters of the life tenant in case the life tenant dies without issue. Then follows the clause in question: "Finally," that is to say, as a final disposition of so much of the trust fund as does not pass under the above provisions, it is "to be conveyed, divided and distributed among their issue as herein before provided," that is to say, it is to be conveyed, divided and distributed among the issue of my sons or daughters who, as they did or did not survive the several life tenants who died without issue, did or did not participate in the gift over of the share to the income of which that life tenant was entitled during his life; and these issue are to take as "herein before provided," that is to say, as it is hereinbefore provided that issue take when issue do take, namely, *per stirpes* and equally among the several stocks and among those constituting the stocks.

This brings us to the contention of the appellants in the second appeal, two of whom are daughters and the third a granddaughter of Mr. Atkins. Their contention is that if the phrase "surviving sons or daughters" means neither surviving the testatrix nor surviving the last life tenant, it includes the issue of all the children of the testatrix, and among others the two daughters who successively married Mr. Atkins. In support of this argument these appellants urge that the general scheme of the will is equality and to construe this clause to exclude them here is not to treat them equally.

But it is agreed that both the daughters of the testatrix who married Mr. Atkins predeceased the testatrix, and although it is not specifically agreed that they were dead when the will was made less than two years before the testatrix died, yet from the fact that provision is made for these grandchildren and none for their mothers, we think that, if it is material, both must be taken to have been dead before the will was made, as well as before the testatrix died. The "sons or daughters" to whom "their issue" in the clause in question refers does not include the daughters who predeceased the testatrix, for those daughters could not have survived the several life tenants. The rest of the argument of these appellants is equally unfounded. The general scheme of the will is not to put these grandchildren on

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an equality with the other descendants of the testatrix. The testatrix had had ten children; eight were living, two were dead. The two who were dead were daughters who had successively married Mr. Atkins, and each daughter had left issue. Yet the residue was divided into nine, not into ten, parts, and one part was given to the issue of these two daughters. Again, in the gift over of the share of a life tenant dying without issue, the sons and daughters who survived the several life tenants took to the exclusion of the issue of the deceased brothers and sisters.

The third appeal is taken in behalf of minors and unascertained persons. The minors are great-grandchildren and great-great-grandchildren of the testatrix. The grandchildren of the testatrix, from whom they are descended, were all living at the death of the last life tenant. The decree of the Probate Court directed that the estate should be divided into four parts, one part for each of the children who died leaving issue, to be paid to the children then living of the sons or daughters of the testatrix who died leaving issue, and to the issue of such children who had died leaving issue. As we understand the contention of these appellants, it is that the four parts should be distributed, not to the immediate issue of the sons and daughters of the testatrix and their issue if dead, but should be distributed *per capita* among all living issue, including great-great-grandchildren of the testatrix whose grandparents, children of the sons and daughters of the testatrix, and whose parents are alive. In support of this contention these appellants at the oral argument cited *Jackson* v. *Jackson*, 153 Mass. 374. But the decree of the Probate Court with which these appellants are dissatisfied is supported by that case. See also *Hall* v. *Hall*, 140 Mass. 267; *Dexter* v. *Inches*, 147 Mass. 324.

Decree affirmed.

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MARY M. GRANT *vs.* SINGER MANUFACTURING COMPANY.

Suffolk. November 23, 1905. — March 1, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Master and Servant.

In an action against a corporation manufacturing sewing machines for an assault on the plaintiff alleged to have been committed by a servant of the defendant in taking from her a sewing machine for non-performance of the conditions of a contract of conditional sale, there was evidence that one S. was employed by the defendant to take machines on failure of the purchasers to pay for them in accordance with the conditions of their contracts, that his instructions were to take the machine if he could get it peaceably, and, if not, to report the matter, whereupon his superior would replevy the machine, that he had men under him to do business and was supposed to handle these men, that he employed one A. to assist him in removing the machine in question, having made a sham sale from the defendant to A. for the purpose of giving him an apparent title, and that A. in attempting to remove the machine was resisted by the plaintiff and committed the assault. *Held*, that a verdict for the plaintiff was justified, the defendant being liable for the acts of A. in the course of his employment, even if A. had been told not to use force.

TORT for an assault by alleged agents of the defendant. Writ dated February 12, 1903.

At the trial in the Superior Court before *Gaskill*, J. the jury returned a verdict for the plaintiff in the sum of $500; and the defendant alleged exceptions.

The following statement of the case is taken from the opinion of the court:

This is an action for an assault committed by one Andrews, in taking from the plaintiff a sewing machine when she was in arrears in her payments for it. She bought the machine of the defendant. The defendant contended that the sale was conditional; that the plaintiff had taken a written lease of the machine, and that the plaintiff had been furnished with a copy of it under R. L. c. 198, § 12. But on this point the evidence was conflicting.

The plaintiff introduced evidence that on the day in question one Sexton and one Andrews came to her house in a wagon on which was painted "Singer," and that Andrews "in attempting to remove said machine, was resisted by the plaintiff, whereupon

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the said Andrews choked her and pushed, tearing her dress, and committed the assault and battery on the plaintiff" here in question.

To prove that Andrews was in the defendant's employ the plaintiff relies on the following evidence. One of the plaintiff's witnesses testified "that he had seen Andrews in the Chelsea office on an average of three or four times a week." Andrews, on being asked by the defendant if he had ever been employed by the defendant, answered: "Not under salary, no." He further testified on direct examination that he bought the plaintiff's lease for $5, "with the understanding that if the machine was obtained the Singer Company was to take it into their store and sell it and pay him his $5 out of the proceeds, and that he received from Sexton a bill of sale of the machine, which he had turned over to the bookkeeper of the Chelsea office of the Singer Company, after trouble had been made by the Grants and which he had been informed could not now be found." On cross-examination he admitted that before the matters here complained of "the only work he had done for the Singer Company was in the way of looking up lost machines, which numbered five or six"; that he never had paid the $5 nor had it charged to him in account although the defendant owed him money; "that he had accompanied Sexton on several occasions, when he had made collections, and had on some occasions assisted him in taking out machines when there had been no trouble at all; that is, Sexton had gone in and talked the matter over, and had then called him to help take out the machine; that his first case for the Singer Company would date back about twelve years." Sexton testified to the sale to Andrews, and that he accompanied him to identify the machine. He denied that any assault was committed, but he admitted that after seeing that "there was going to be trouble in obtaining the machine he said, 'Mr. Andrews, you need not proceed any farther, I will send and replevin the sewing machine.'" On cross-examination he testified to employing Andrews on several previous occasions to locate lost machines, and that he had accompanied him when he went for those machines before and since the time here in question.

Madigan, Sexton's superior, was called and testified that Sex-

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ton's instructions were to take the machine if he could get it peaceably, and if not, to report it and he would replevy it. On cross-examination he testified "that Sexton had men under him to do business." In answer to the question whether Sexton could give orders to these men under him without communicating with Madigan, he answered, "Well, if there was anything come up he could always ask me about it, but then he was supposed to handle. But he couldn't call up every minute of the day, but was supposed to handle these men."

The defendant asked for the following rulings:

"1. Upon the evidence and under the pleadings the action cannot be maintained.

"2. Any authority given by the defendant to its agents or servants to remove or repossess a machine delivered under a lease where the payments were in default does not necessarily constitute authority to use force to accomplish such removal or repossession.

"3. If the defendant had expressly instructed its agents in the work of removing or repossessing a machine to accomplish such removal only by peaceable means and without the use of force and if the machine could not be removed or repossessed by peaceable means and without the use of force, then to obtain possession under a writ of replevin, no express authority to use force would be conferred and any implied authority to use force would be negatived.

"4. To make the acts of the said Sexton or said Andrews or either of them binding upon the defendant it must appear that said acts were done for the purpose of performing what the defendant had directed and in the execution of the authority actually given by the defendant to its agents.

"5. If the alleged acts complained of were not done in the actual removal of the machine and for the purpose of accomplishing such removal, but on the other hand were done for the purpose of revenge or some other improper purpose the defendant would not be liable.

"6. Upon the evidence no authority whatsoever is shown by which any acts done by said Andrews can bind the defendant company. Any alleged delegation of authority on the part of said Sexton to the said Andrews purporting to authorize the

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said Andrews to use force would not be binding upon this defendant."

These rulings were refused, except so far as they were given in the charge. The judge in substance left it to the jury to say whether the sale to Andrews was a sham and he was in reality an employee of the defendant, telling them that, if they found that he was, they could find the defendant liable if they believed that he assaulted the plaintiff to get possession of the sewing machine.

The defendant excepted to the refusal to give the rulings requested, and to two parts of the charge: First, to a statement in the early part of the charge in which the judge told the jury that if they found that unnecessary violence was used in case a lease was given and a copy furnished, "then you come to this question, — What makes, or will make the defendant corporation liable for the unjustifiable act of Andrews? Well, that depends entirely, gentlemen, upon whether Andrews in the first instance was acting in behalf of the corporation or not," and second, to this instruction: "If Sexton had no authority to get anybody to help him, why then, of course that does not bind the Singer Manufacturing Company, but if in the course of business which had been conducted prior to this time, the company, that is, the higher officials of the company, those that had a right to give directions, had known that Sexton was doing that, hiring Andrews to assist him when he wanted to go and get a machine, and had paid him, was that out of the funds of the Singer Manufacturing Company that Andrews had been paid for the work that he had done? Then you have the right to consider that upon the question of the authority of Sexton to employ somebody."

Exceptions were taken to the refusal to give the rulings requested, and to the two parts of the charge of the judge stated above.

A. M. Lyman & L. D. Jennings, for the defendant.

E. L. McManus, J. A. McCaig & J. F. Lynch, for the plaintiff.

LORING, J. [After the foregoing statement of the case.] The evidence warranted a finding that Sexton was authorized to employ assistants; that he had employed Andrews to assist him in retaking the plaintiff's machine, and that the sale to Andrews was a sham.

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It is settled that the defendant would be liable for force used by Andrews as a means of retaking the machine, even if he had been told not to use force. *Roberge* v. *Burnham*, 124 Mass. 277. *George* v. *Gobey*, 128 Mass. 289. The defendant's liability does not depend upon his having been authorized expressly or impliedly to use force, but upon his having used force as a means of doing what he was employed to do. *Howe* v. *Newmarch*, 12 Allen, 49. *McCarthy* v. *Timmins*, 178 Mass. 378. *Perlstein* v. *American Express Co.* 177 Mass. 530. There is no difference between hiring a man to retake a machine with instructions not to use force, and instructing an officer in hiring men to retake machines to hire them to retake machines without using force.

There was no evidence in the case calling for the fifth ruling as to an assault for the purpose of revenge.

The defendant's counsel have not taken up the several exceptions in their argument. We have followed their argument and have not dealt with the exceptions separately.

Exceptions overruled.

JULIAN SCHOLL & another *vs.* GEORGE W. KILLORIN.

Middlesex. November 24, 1905. — March 1, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Evidence, Extrinsic affecting writings.

In an action for the balance of the price of a steam roller sold by the plaintiff to the defendant under a contract in writing, described as "one of our Universal Steam Rollers of ten tons weight" and guaranteed to be "a first class and proper roller in every respect for building roads of crushed stone and gravel," the defendant cannot be allowed to show by oral evidence that when he ordered the roller before the execution of the contract he told the plaintiff that he wanted the roller for doing work between the rails of street railway tracks and that it should not be more than fifty-two inches wide and that the plaintiff agreed to furnish him a roller of that width, whereas the one furnished was fifty-four inches wide and for that reason was unsuitable for the work for which it was ordered.

CONTRACT, for a balance alleged to be due of the price of a steam roller sold to the defendant under a contract in writing printed below. Writ dated January 11, 1905.

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At the trial in the Superior Court the jury returned a verdict for the plaintiffs in the sum of $643.43; and the defendant alleged exceptions.

The following statement of the case is taken from the opinion of the court:

This is an action of contract to recover the unpaid balance due under the following contract:

"Proposal for Universal Steam Roller
Executed in Duplicate.

"February 17, 1904.

"Mr. Geo. W. Killorin,
Wakefield, Mass.

"Dear Sir: —

"We will furnish you one of our Universal Steam Rollers of 10 tons weight, F. O. B. factory for the sum of three thousand and one hundred dollars ($3100).

"Terms: — $1000 cash upon acceptance of this proposition and remaining $2100 to be paid 30 days after delivery of said roller.

"We hereby agree to pay one half of the freight charges necessary to deliver the said roller at Wakefield, Mass. and we will furnish the services of an expert operator to unload roller and instruct in the use of same, for which you are to pay us the sum of $4 per day beside paying for the lodging and board of said operator from the time of his arrival to unload roller until notified by you that his services are no longer required. It being also understood that you will furnish all necessary timbers and labor for constructing incline down which the roller must be run when taken from the car beside rendering such other assistance as may be necessary in unloading roller.

"We guarantee this roller to be a first class and proper roller in every respect for building roads of crushed stone and gravel; well made and durable; of the best materials and workmanship throughout, and we will furnish for one year free of charge F. O. B. cars factory, any part that may be found defective in either workmanship or material under proper usage, but this guarantee does not contemplate furnishing free of charge parts which may be required through ordinary wear and tear.

"Julian Scholl & Co.
by Hines.

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"The above proposition is hereby accepted on the day above written.

"G. W. Killorin."

The roller was delivered in the early part of April, 1904. On June 25 of the same year the defendant wrote that he "bought this roller to be a 52″ wide the width of wheels so I might roll stone between tracks of regular gauge. Mr. Hines told me that it is only 52″ wide but according to my measure it is 54″ wide which makes it 2″ too wide to do the work which I bought it to do," and he finally refused to pay for it on the ground that it was fifty-four inches wide.

At the trial the defendant offered to prove the following facts:

"Mr. Moran. — The agent came there, and there was talk between them. My client said, 'My particular work is building street railways. I have got a roller for doing road work, and I don't need another one; but, from the picture you show me there, that roller looks as though it would be a good roller to roll between rails of tracks, and of course if it can do that work I will purchase it. I have one roller that will do road work now as I have been doing it, take a three-wheel roller, and one of the wheels will ride the track, and the other runs between. Now, if you say it can do that work, I will buy that roller.' 'Now, how wide had that roller ought to be' —

"The Court. — Who said that, 'How wide ought it to be?'

"Mr. Moran. — Mr. Hines said, 'How wide ought it to be?' Mr. Killorin said it should be not more than fifty-two inches; 'the tracks are fifty-six inches, and in our tracks there are a great many guard rails; those guard rails are between two and three inches wide, and in going around curves there would have to be an inch or so to spare, so that in order that that roller could be used by me it should not be more than fifty-two inches; so if you say that you can furnish that kind of a roller for me, I will take it.' He says, 'That is just the kind of roller that we have; we will furnish such a roller for you; we will produce it for you; we will have that roller for you built so you can use it in track building if you purchase of us.' Some time later he made a statement in the presence of the defendant, in talking about this roller —

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"The Court. — Afterwards? What does that mean, after the written instrument was made?

"Mr. Moran. — After the contract was made.

"The Court. — Anything said then wouldn't be competent anyway, unless it was an admission of what he said before.

"Mr. Moran. — The question came up of how the roller was liked; I think he was exhibiting it at the time, and he said, 'Mr. Killorin has got a good roller; he has got the only roller that can roll between the two rails of tracks. I sold him the roller for that particular purpose. That is the only roller manufactured that can do that.'

"That is all the evidence as stated. If your Honor rules that out, there is nothing further for the jury to decide.

"The Court. — The only suggestion I have to make about that is this: That can't be considered as in the nature of what would be called a false and fraudulent statement. That is, admitting all you say is true, that is only a promissory statement, a statement of what it will do. He says, 'What do you want, Mr. Killorin?' Mr. Killorin says, 'I want a roller fifty-two inches wide,' or a certain width. Mr. Hines says, 'Well, that is the kind we make; we have got it; we will furnish it.' Now that is not what would be called a false and fraudulent statement. If your client wished some specific kind of roller, he should have it inserted in the contract. I can't allow parol evidence to go in to modify a written contract.

"Mr. Moran. — He pointed to a photograph that he had of a roller which they made.

"Mr. Poland. — Not of this weight.

"Mr. Moran. — They had no roller in existence, a ten-ton roller fifty-two inches wide, and he knew it. He showed him this photograph and told him it would be a ten-ton roller like that; that they were all fifty-two inches wide."

Upon this the presiding judge made this ruling: "Assuming that to be true, that he had promised to furnish it, that is promissory in its nature. It seems to me that would be opening the contract to allow the evidence to go in; it would be inserting something into that contract that wasn't agreed upon by the parties. More than that, it seems to me that the duty was imposed upon Mr. Killorin when the machine arrived to examine

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it and find out what its condition was and whether it did fulfil the terms of the contract. If he did not see fit as to that, and kept it two or three months the vendors ought not to be harmed; he had no right to keep it in his possession two or three months without saying something, if any such agreement was made. I am only assuming the most favorable view of the defendant's case. I think under those circumstances I shall have to exclude that testimony."

To this ruling the defendant took an exception.

A. D. Moran, for the defendant.

G. M. Poland, for the plaintiffs.

LORING, J. [After the foregoing statement of the case.] The evidence was properly excluded on the first ground stated by the presiding judge. *Neale* v. *American Electric Vehicle Co.* 186 Mass. 303. *Kinnard Co.* v. *Cutter Tower Co.* 159 Mass. 391. It is not necessary to consider the other ground on which the ruling was made.

Exceptions overruled.

WASHINGTON NATIONAL BANK *vs.* SAMUEL WILLIAMS.

Suffolk. November 27, 1905. — March 1, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Execution. Practice, Civil, Docket entries. *Evidence,* Presumptions and burden of proof.

The provision of Pub. Sts. c. 171, § 15, now R. L. c. 177, § 16, that "no execution shall be issued within twenty-four hours after the entry of judgment" is waived by an agreement of the judgment debtor filed in court "that judgment may be entered for the plaintiff and execution issued forthwith" for a sum named.

Where the record of a court shows a docket entry of a judgment, which is in accordance with an agreement of the parties filed in court, there is a presumption of fact that the entry was made upon an order of the court unless the contrary is shown.

CONTRACT, against the surety on the recognizance of one Joseph Dews, a poor debtor. Writ dated March 15, 1900.

The first trial of this case in the Superior Court was before *Mason*, C. J., who found for the defendant. Exceptions of

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the plaintiff were sustained in a decision reported in 188 Mass. 103, and there was a new trial before *Hardy*, J.

At the new trial the following facts were agreed by the parties and found by the judge in accordance with that agreement:

The plaintiff recovered judgment against Dews, the principal in the recognizance, in the Superior Court for Suffolk County, on August 20, 1896, in the sum of $4,171.66, debt and $10.13, costs. The writ in that action was dated July 7, 1896, returnable on the first Monday of August, 1896, and service was accepted by Dews personally. The writ was not entered in court on the return day but on August 20, 1896; Dews personally signed an agreement for the late entry, and the writ and declaration and an answer, signed by the defendant personally, were entered on that day. The following agreement in writing was made between the plaintiff, by his attorney, and Dews and was filed on August 20, 1896:

"Commonwealth of Massachusetts, Suffolk ss., Superior Court, Washington National Bank *v.* Joseph Dews. It is agreed in the above entitled cause that judgment may be entered for the plaintiff and execution issued forthwith for the amount of $4,174.66 and costs.

"Charles H. Tyler, Plaintiff's Attorney.

"Joseph Dews."

In accordance with this agreement judgment was entered and execution issued thereon on August 20, 1896, and on the same day the arrest of Dews on the execution was authorized by *Forsaith*, J. of the Municipal Court of the City of Boston. On the same day Dews was arrested on the execution and was taken before *Forsaith*, J., where he made application to take the oath for the relief of poor debtors, and entered into a recognizance in the usual form in the penal sum of $4,500 in favor of the plaintiff with Samuel Williams, the defendant in this action, as his surety. Thereafter Dews appeared for examination from time to time in accordance with the condition of the recognizance until May 31, 1899. On September 2, 1898, while the examination of Dews by the plaintiff was pending in the municipal court, Dews was, upon his voluntary petition, adjudged a bankrupt by the District Court of the United States for the District of Rhode Island.

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Before the filing of the petition in bankruptcy the examination of Dews had been continued by agreement to September 28, 1898, and on that day the time for his examination was continued in the municipal court to January 25, 1899, upon the agreement of the plaintiff and Dews, and thereafter the examination was continued by the municipal court upon similar agreements to February 1, 1899, April 5, 1899, May 10, 1899, and May 31, 1899, respectively. The record of the municipal court shows no suggestion of bankruptcy or any continuance or stay ever requested or granted on account of bankruptcy proceedings. No action was taken by or requested of the United States court with reference to the proceedings in the municipal court. On May 31, 1899, the day to which the examination had been continued, and while the question of Dews' discharge in bankruptcy was pending, Dews failed to appear and submit himself for examination in the municipal court in accordance with the condition of his recognizance. The judge ordered the default of the defendant to be recorded.

No written suggestion of bankruptcy ever was filed by Dews in the municipal court, but a verbal statement that bankruptcy proceedings were pending was made by his counsel in open court. The pendency of the bankruptcy proceedings was one of the reasons but not the sole reason for the continuance of the case in the municipal court from time to time. The examination of Dews in the bankruptcy proceedings by the plaintiff had been begun in Rhode Island before May 31, 1899, and then was pending. The plaintiff never received any dividend either in bankruptcy or elsewhere on the judgment against Dews.

The evidence in regard to the entry of judgment is described in the opinion. At the close of the evidence the defendant asked for the following special findings of fact:

1. That the judgment against Joseph Dews, the principal debtor, on which was issued the execution under which the arrest was made and the recognizance sued upon was given, was not entered under any general order of court.

2. That the execution under which the principal debtor was arrested was not issued under any general order of the court.

3. That in the action of the plaintiff against the principal debtor Dews, there was no order passed by the court, either

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before or after the filing of the agreement of the parties that judgment might be entered and execution issued forthwith, directing an entry of final judgment for the plaintiff.

4. That in the action of the plaintiff against the principal debtor Dews, there was no order passed by the court, either before or after the filing of the agreement of the parties that judgment might be entered and execution issued forthwith, directing the issuing of a writ of execution in favor of the plaintiff.

The defendant also requested the following rulings:

1. If the court finds that in the case of Washington National Bank *v.* Dews, being the case in which was entered the judgment on which was issued the execution under which the arrest of the principal debtor was made and the recognizance sued on was given, there was no order of the court directing the entry of final judgment for the plaintiff which was entered in that case, the clerk had no authority to enter up the judgment, or to issue within twenty-four hours thereafter the execution which was issued, and the arrest of the principal debtor Dews made under the execution was illegal and the recognizance given by the defendant was void, and the defendant is not liable in an action thereon.

2. If the court finds that in the case of Washington National Bank *v.* Dews, being the case in which was entered the judgment on which was issued the execution under which the arrest of the principal debtor was made and the recognizance sued on was given, there was no order of the court directing the issuing of an execution within twenty-four hours after the entry of judgment in that case, the clerk had no authority to issue the execution, or to issue any execution within twenty-four hours after the entry of judgment, and the arrest of the principal debtor Dews made under the execution was illegal, and the recognizance given by the defendant was void, and the defendant is not liable in an action thereon.

3. Upon all the evidence the plaintiff cannot recover against the defendant in this action.

The judge made the following findings and rulings:

"I find the facts in accordance with the first and second requests of the defendant.

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"As to the third and fourth requests of the defendant I find that the papers in the original cause and the docket show no entry of any special order of the court directing that judgment be entered and execution be issued forthwith.

"However, from the facts in evidence I assume and infer as a matter of fact as well as law that a proper order was given in accordance with the agreement of the parties. I find no fact in evidence sufficient to rebut such inference and assumption.

"So far as the request of the defendant for rulings of law are consistent with such findings of fact above given I grant them. His other requests are denied."

The judge found for the plaintiff. He assessed damages in the penal sum of the bond, $4,500, with interest from the date of the writ, making $5,498.61, and ordered that execution issue for that sum.

The defendant alleged exceptions.

F. H. Williams & F. M. Copeland, for the defendant.

H. E. Bolles, C. H. Tyler & B. D. Barker, for the plaintiff.

HAMMOND, J. This is an action of contract against a surety on a recognizance from Joseph Dews, a poor debtor. It is agreed that the writ was entered, judgment was entered, execution was issued, the judgment debtor was arrested and the recognizance was given all on the same day.

The question is whether the execution was void as having been issued contrary to law. Pub. Sts. c. 171, § 15, (now R. L. c. 177, § 16,) in force at the time of this execution, provided that no execution should be issued "within twenty-four hours after the entry of judgment." It has been decided, however, that this provision being for the benefit of the judgment debtor can be waived by him (188 Mass. 103); and we are of opinion that the agreement filed in court shows such a waiver. It is contended that the plaintiff failed to show that the judgment upon which the execution issued was duly entered, either upon any general order or special order of the court. The judge found as a fact that there was no general order, but that there was a special order. The defendant contends that the finding that there was a special order was not warranted by the evidence.

Upon this matter the evidence was somewhat conflicting. The docket entries contained the following: "1896, August 20, judg-

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ment for plaintiff for $4,174.66 and costs. Execution forthwith." The original papers consisting of the original writ, the declaration, the answer and the agreement for judgment, all being dated August 20, 1896, and all having been entered in court on that day, were before the court. Mr. Bearse, an assistant clerk of the court called by the defendant, testified that he had been connected with the clerk's office ever since 1887; that there was nothing on either the papers or the docket indicating any action by the court, and that "under the practice of the office if there had been any action on the part of the court it would have appeared on the docket or upon the papers." Upon cross-examination he testified that he had nothing to do with the docket entries made in this case, nor with the entries upon the original papers; that "the entries in the docket are made up after the entries on the original papers, and making them up is a mere clerical matter for any one in the office under direction from the person who makes them on the paper, so that the real original entries are made on the papers." He further testified that until about September 1, 1902, "it was the custom of the office to enter judgment at once upon the filing of an agreement for immediate judgment signed by both parties." In rebuttal Mr. Willard, called by the plaintiff, testified that he was the first assistant clerk of the court, had been such for fifteen or twenty years, had been one of the clerks for twenty-eight years, and had been in the office in some capacity as an assistant for about thirty-eight years; and that during all of that time he had been practically familiar with the customs and practices of the office; that the office entries made upon the original papers in this case were all in his handwriting, but the docket entries were in the handwriting of some other person, and that it was the custom of the office to "hand over the papers to anybody to make the docket entries." He further testified that before 1902 it always had been the practice of the office to enter judgment "forthwith, that is, on the same day, under an agreement" like the one filed in the original case; that he could not remember whether in this case he obtained an order from any judge of the court before entering the judgment; that it has not been the universal practice of the clerks to enter "their initials or the judge's initials on a paper or an order in an informal matter where the

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parties have agreed." Upon cross-examination he testified that it has not always been the practice of the clerk to make a memorandum either on the docket or on the papers to the effect that the judge has made an order, that "the practice is just as much one way as the other," that it would possibly depend upon the importance of the order, and that he "should not necessarily do it in entering up by consent of parties a judgment for $4,000."

The above contains the substance of the testimony bearing upon the question whether the judgment was entered by a special order. This is not a case like *Hathaway* v. *Clark*, 5 Pick. 490, upon which the plaintiff relies, where the record fails to disclose a fact essential to the jurisdiction of the court or the validity of an order of the court. There is a record here in the shape of a docket entry, and this entry shows that judgment was entered. "The docket is the record, until the record is fully extended, and the same rules of presumed verity apply to it as to the record. Every entry is a statement of the act of the court, and must be presumed to be made by its direction, either by a particular order for that entry, or by a general order, or by a general and recognized usage and practice, which presupposes such an order. We must therefore presume that the several entries on the docket under this action were made by the clerk by proper authority." Shaw, C. J. in *Read* v. *Sutton*, 2 Cush. 115, 123. We cannot say that, in coming to the conclusion that as a matter of fact this presumption was not controlled by the testimony, the trial judge in the case before us made any error. The finding was warranted by the whole evidence. We see no error of law in the conduct of the trial.

Exceptions overruled.

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GEORGE D. LAHAR *vs.* JOHN H. ELDRIDGE & others.

Suffolk. November 27, 1905. — March 1, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Municipal Corporations. Taunton.

Under the charter of the city of Taunton, St. 1882, c. 211, the provision, contained in section 1 of chapter 12 of the ordinances of that city, that the mayor and aldermen shall annually appoint policemen who shall continue in office until their successors are appointed and qualified, is valid.

St. 1904, c. 314, providing that a person holding office or employment classified under the civil service rules of the Commonwealth shall not be removed except for just cause and for reasons specifically given in writing, does not affect the expiration of the term of employment of a police officer appointed under an ordinance of a city authorized by the city charter which prescribes the length of the term.

PETITION, filed May 13, 1905, for a writ of mandamus as described in the first paragraph of the opinion.

The case came on to be heard before *Morton*, J., who by agreement of all the parties reserved it upon the pleadings and an agreed statement of facts for determination by the full court.

A. S. Apsey, for the petitioner.

W. J. Davison, for the respondents.

KNOWLTON, C. J. This is a petition for a writ of mandamus to compel the mayor, the board of aldermen and the chief of police of the city of Taunton, to recognize the petitioner as a member of the police force of that city, and to restrain the respondent Coyle from acting as a police officer in the place of the petitioner.

Section 1 of chapter 12 of the city ordinances is in part as follows: "The mayor and aldermen shall annually as soon as may be after the organization of the city government and whenever a vacancy occurs appoint a chief of police, deputy chief, captains, lieutenants and policemen, such as they deem necessary, with all the powers and duties of constables, who shall continue in office respectively until their successors are appointed and qualified, unless sooner removed by the mayor and aldermen." In January of two successive years, 1903 and 1904, the petitioner was appointed as a police officer under this ordinance, and he continued to act as such an officer until January 3, 1905.

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On January 4, 1905, the respondent Coyle was appointed in his place, in accordance with the terms of this ordinance, and was regularly qualified. If this ordinance, in its provisions for the appointment of officers, is legal and binding, the petitioner's term of office expired on the appointment and qualification of Coyle as his successor.

The petitioner contends that the appointment was for life, unless he should be removed by the mayor and aldermen for cause, and that he was removed without cause and without a hearing.

The question to be considered is whether the ordinance is valid. It was adopted under the St. 1882, c. 211, which provides in § 9 as follows: "The executive power of said city generally, and the administration of the police, with all the powers formerly vested in the selectmen of the town of Taunton, and heretofore vested in the mayor and aldermen of the city of Taunton, shall continue to be vested in and exercised by the mayor and aldermen of said city, as fully as if the same were herein specially enumerated. The mayor and aldermen shall have full exclusive power to appoint constables, and a city marshal or chief of police and assistants, with the powers and duties of constables, and all other police officers, and to remove the same when cause exists therefor. All other powers now vested in the inhabitants of said city, and all powers granted to them by this act, shall be vested in the mayor and aldermen and common council, . . . to be exercised by concurrent vote," etc. These provisions are found in almost identical words in the original charter of the city, St. 1864, c. 209, of which the later statute is a revision.

All purely executive power in regard to the police, including administration and appointment, is given to the mayor and aldermen. All other power is given to the two boards which together constitute the city council. The power of appointment of police officers in the selectmen, at the time of the adoption of the original charter, was to "hold their offices during the pleasure of the selectmen by whom they are appointed." Gen. Sts. c. 18, § 38. As the selectmen, acting together as a board, could hold office only one year at the time the charter was adopted, the term of police officers appointed by them was one year, unless sooner removed. Gen. Sts. c. 18, § 31. The charter of

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the city did not give the mayor power to remove police officers at pleasure, which the selectmen previously had, but only power to remove them for cause. In other respects it did not make any change.

The petitioner contends that the authority to remove for cause is equivalent to an express statement, not only that an officer shall not be removed during his term of office, except for cause, but that his term of office shall be for life. We do not think that the Legislature intended so radical a change as this. In 1864, when this statute was passed, none of the present statutes and rules for the regulation of the civil service had been adopted, and elections and appointments were commonly for a specified term. We are of opinion that the provision as to the removal of police officers in the original charter, as well as in the revised charter, has reference only to removal during the term for which the officer is appointed. The statute is silent as to the length of time for which the appointments can be made. In view of the reference to the powers formerly vested in the selectmen, and of the fact that the term for which they could appoint was only during the pleasure of themselves, and as their term was only for a year, there is much ground for an argument that, under the charter, the mayor and aldermen could in no event appoint for a term longer than that. However that may be, in the absence of any express provision on the subject, we are of opinion that, under the original charter and the revised charter which give the city council as large power to pass ordinances as towns had to adopt by-laws, and include a right to pass ordinances "for directing and managing the prudential affairs, preserving the peace and good order, and maintaining the internal police," the city council might pass ordinances which should prescribe one year as the term of office for members of the police department. Gen. Sts. c. 18, § 11. Pub. Sts. c. 27, § 15. R. L. c. 25, § 23. St. 1882, c. 211, § 22.

The ordinance being valid at the time of its adoption, the term of office prescribed by it was not affected by the St. 1904, c. 314, which refers only to the term of office or employment under existing provisions of law or ordinance, and not to a case where the term of office has expired. *Smith* v. *Mayor of Haverhill*, 187 Mass. 323, 325.

Petition dismissed.

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SARAH A. CALDWELL *vs.* HERBERT NASH & others.
HENRY L. CALDWELL *vs.* SAME.

Suffolk. December 6, 1905. — March 1, 1906.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Husband and Wife. Bills and Notes. Insolvency.

A promissory note payable to the order of the son of the maker and by him indorsed to the wife of the maker, delivered by the maker to his wife in payment for money borrowed from her by him, the son having no beneficial interest in the transaction, is void in equity as well as at law.

The authority given to the Court of Insolvency by Pub. Sts. c. 157, § 35, R. L. c. 163, § 44, to expunge claims is without limitation of time, and the power thus unlimited applies to cases of composition. R. L. c. 163, §§ 154, 167.

Where in accordance with the terms of a composition with creditors confirmed by the Court of Insolvency assets of the debtor remain in the possession of the assignees after the discharge of the debtor, to secure the payment of the notes given to creditors in pursuance of the composition, it is the duty of the assignees to render an account to the court, and such an account is not filed too late because necessarily after the discharge. In such an account the assignees may be allowed a reasonable compensation for their services under Pub. Sts. c. 157, § 56.

KNOWLTON, C. J. These are appeals from decrees of a single justice dismissing two bills in equity. The first of these cases is a suit under R. L. c. 163, § 17, to set aside a decree of the Court of Insolvency expunging the proof of a claim of the plaintiff, which previously had been allowed against the insolvent estate of her husband, Henry L. Caldwell. This claim was founded on three promissory notes made by the debtor, payable to the order of his son Henry L. Caldwell, Jr., and by him indorsed to the plaintiff. These notes were never filed in the Court of Insolvency, but were referred to in the affidavit of the plaintiff on which they were proved as being attached to a proof of a claim against the estate of Henry L. Caldwell, Jr., and the testimony of the assignees was that they never saw them until the hearing of this case in the Supreme Judicial Court.

The evidence tended to show that these notes were given by the debtor to his wife, for money borrowed of her by him. They were said to represent an account for borrowed money which appeared upon his books, and there was no evidence that

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Henry L. Caldwell, Jr. had any relation to the transactions except to put his name upon the back of the notes. If these notes, with the indorsements upon them, were given by the debtor to his wife for borrowed money, they were void. A husband cannot make a contract of this kind with his wife. *Roby* v. *Phelon*, 118 Mass. 541. *Fowle* v. *Torrey*, 135 Mass. 87. *National Granite Bank* v. *Whicher*, 173 Mass. 517. *National Granite Bank* v. *Tyndale*, 176 Mass. 547. *Woodward* v. *Spurr*, 141 Mass. 283. *National Bank of Republic* v. *Delano*, 185 Mass. 424. The indorsement of the son, Henry L. Caldwell, Jr., appears to have been merely for accommodation, and does not affect the validity of the notes between the maker and his wife to whom they were delivered in consideration of money lent. The case is not like *Spooner* v. *Spooner*, 155 Mass. 52, where the note was made and delivered as a valid contract with a third person, upon a consideration moving from the wife.

The evidence does not show an equitable liability on the part of the debtor which was provable against his estate. There was simply an attempt of husband and wife to contract with each other, which cannot be effectual, either at law or in equity. *Fowle* v. *Torrey*, 135 Mass. 87. *Woodward* v. *Spurr*, 141 Mass. 283. *National Granite Bank* v. *Tyndale*, 176 Mass. 547.

It seems plain that the original proof was erroneous, and that it was expunged properly, unless the court had lost its power to grant the petition by reason of the lapse of time. The authority to expunge such a proof is given in broad terms, without limitation of time. Pub. Sts. c. 157, § 85. R. L. c. 163, § 44. Section 154 of R. L. c. 163, expressly makes this authority applicable to cases of composition. General authority to make orders in cases of composition is also very broad, and is unlimited in time. St. 1884, c. 236, § 12. R. L. c. 163, § 167.

The conditions had not so changed after the erroneous proof as to make the proof immaterial. By a peculiar and unusual provision in the offer of composition which was confirmed by the court, the assets of the debtor were to remain in the possession of the assignees, and be held by them to secure the payment of the notes given to creditors in pursuance of the composition. At the time of the decree expunging the proof, the note, given to the plaintiff under the composition, had not been fully paid,

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and the assignees had not sufficient money in their hands to pay it, after deducting the amount due them for their services. There was, therefore, a good reason for an application to the court to correct the error made in the original allowance of the claim. The bill to set aside the decree of the Court of Insolvency was dismissed rightly.

The second case is a suit, brought under the same statute as the other, to set aside a decree of the Court of Insolvency allowing the account of the assignees of the estate of Henry L. Caldwell. The principal objection to this decree is that the account was filed too late. We have already seen that, by the terms of the composition, the duties of the assignees were to continue after the confirmation of the composition, and after the discharge of the debtor. It appears that the assignees have assets of the estate in their hands. Under these circumstances it was plainly their duty to render an account to the court. Pub. Sts. c. 157, § 59. *Wilson* v. *Boylston National Bank*, 170 Mass. 9.

Nor is there any reason why they should not be allowed proper compensation for their services. Pub. Sts. c. 157, § 56. *Wilson* v. *Boylston National Bank*, *ubi supra*. In each case the entry must be,

Decrees affirmed.

W. C. Cogswell, for the plaintiffs.

C. P. Greenough & J. Codman, for the defendants.

CHARLES D. GURLEY *vs.* WILLIAM G. REED & others.

Suffolk. December 8, 1905. — March 1, 1906.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Equity Pleading and Practice. Pledge.

It is a proper exercise of the discretion of a judge sitting in equity to deny a motion to recommit a master's report in order that the master may report further findings of fact on evidence bearing upon the principal questions of fact decided by him, where the rule to the master did not call for a report of the evidence and the additional findings of fact desired are not necessary to the understanding of any question of law involved in the case.

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If one indorses a certificate of stock in blank and entrusts it to another permitting him to have the stock transferred to himself and to take out a certificate in his own name for the purpose of pledging the stock for the benefit of the owner, and the person thus entrusted with the stock wrongfully pledges it to secure his own promissory note given in part for advances of money and in part for a pre-existing debt, the pledgee, if he takes the stock in the belief that the pledgor is the owner of it, acquires the right to hold it for the full amount of the debt to him, and the owner's only remedy in equity is to redeem the stock from the pledge.

BILL IN EQUITY, filed in the Superior Court on April 27, 1903, William G. Reed, George H. Plummer, William A. Clark and Clarence F. Eldredge, praying, 1, that the defendant Plummer be enjoined from selling four hundred shares of the Provident Securities and Banking Company belonging to the plaintiff which wrongfully were pledged to him by the defendant Reed as collateral security for a note of the defendant Reed for $21,000, 2, that the defendant Plummer be ordered to deliver the certificates for the shares to the plaintiff upon payment to the defendant Plummer of such sum, if any, as might be found by the court to have been advanced by him as a loan on such security in good faith, and 3, for further relief.

The bill was taken as confessed against the defendant Reed. The other defendants filed answers. The case was referred to a master who filed a report.

He found that the plaintiff entrusted the certificates for the four hundred shares of the Provident Securities and Banking Company to the defendant Reed, indorsed in blank, and at Reed's request consented that the certificates of stock should be put in Reed's name to facilitate his using them to raise money for the plaintiff in connection with the purchase of certain mining properties.

He found that all the transactions between Reed and Plummer concerning the four hundred shares of stock in question, constituted a violation by Reed of the terms and conditions upon which Reed received the certificates from the plaintiff, the true owner, and a breach of the trust with which the certificates of stock were impressed in the hands of Reed.

Upon all the evidence he found that the defendant Plummer, in good faith, and in reliance upon Reed's apparent ownership of the four hundred shares of stock, the certificates for which stood in Reed's name as owner, and without notice of the purpose for

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which possession of the certificates had been entrusted by the plaintiff to Reed, advanced to Reed the sums of money and parted with the other considerations for which the note was given.

The master found that the defendant Plummer was a *bona fide* pledgee of the four hundred shares of stock to the extent of the value he advanced thereon, namely, to the extent of the value of the cash advanced, plus the value of the extensions and accruing interest, amounting in all to $11,000, together with interest at the legal rate of six per cent per annum from April 17, 1903, the date of the maturity of the $21,000 note.

Both the defendant Plummer and the plaintiff filed exceptions to the master's report.

The plaintiff moved that the master's report be recommitted to the master, with directions that the master report the facts requested by the plaintiff as set forth in his objections and exceptions, or report such facts in connection therewith as the court might direct.

The motion was denied by the judge; and the plaintiff appealed.

The judge made a decree overruling all the plaintiff's exceptions, overruling some of the defendant Plummer's exceptions and sustaining others, and otherwise confirming the master's report. As to the defendants Clark and Eldredge the bill was dismissed. The remainder of the decree was as follows:

"Pursuant to said report, as thus modified, the defendant Plummer is entitled to hold said four hundred shares of the stock of the Provident Securities and Banking Company as collateral security for the note of the said defendant William G. Reed, dated March 17, 1903, with interest thereon according to the terms of said note.

"On payment or tender by the plaintiff to the defendant Plummer, within thirty days from the date of this decree, of the amount due as principal and interest on said note of the defendant William G. Reed, dated March 17, 1903, together with the costs of the defendant Plummer in the suit, to be taxed by the clerk, the defendant Plummer shall deliver to the plaintiff the certificates referred to in said bill, representing said four hundred shares of stock of the par value of $40,000

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of the Provident Securities and Banking Company; and such delivery shall forever bar the defendant Reed from any claim for such stock or any part thereof as against the defendant Plummer. On failure to make payment or tender as aforesaid, the bill is, as to the defendant Plummer, to be dismissed with costs."

The plaintiff appealed from the decree.

G. F. Ordway, for the plaintiff.

C. F. Eldredge, (*G. W. Anderson* with him,) for the defendant Plummer.

KNOWLTON, C. J. The plaintiff's motion to recommit was addressed to the discretion of the court, and we see nothing to indicate that the discretion was wrongly exercised. The rule to the master did not call for a report of the evidence, and such a report was unnecessary. The additional findings of fact which the plaintiff desired were not necessary to the understanding of any question of law involved in the case, but were simply matters of evidence bearing upon the principal questions of fact decided by the master. *Henderson* v. *Foster*, 182 Mass. 447, 448. *Silva* v. *Turner*, 166 Mass. 407. *Freeland* v. *Wright*, 154 Mass. 492.

The plaintiff's exceptions were overruled rightly. There is nothing to show any error in the refusal to find the facts referred to in the exceptions.

The plaintiff entrusted his stock to Reed and permitted the transfer of it to him, and allowed certificates to be taken out in his name for the purpose of enabling him to pledge it as collateral security for money to be borrowed for the plaintiff's benefit. Having the ostensible title of an owner, Reed pledged it for his own benefit. The master has found that the pledgee received it in good faith, in the belief that Reed was the owner of it, and that he now holds it as collateral security for a promissory note, given at the time for a valuable consideration. Under these circumstances he is entitled to hold it for the full amount of his debt. This would be so under the rules of the common law. The St. 1903, c. 423, also expressly provides that such a transaction "shall be a sufficient delivery to transfer title as against all persons." It is immaterial that the consideration of the note which the stock was to secure was, in part, a payment of a pre-existing debt. *Boston Steel & Iron Co.* v. *Steuer*, 183 Mass. 140,

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143, 144, and cases cited. *National Revere Bank* v. *Morse*, 163 Mass. 383.

As against the defendant Reed, the plaintiff has a right to a decree that he is entitled to the stock and to be paid his costs. But this will be of little avail unless he redeems from the claim of Plummer. With this modification the decree will be

Affirmed.

THEODORE H. TYNDALE, administrator, *vs.* EBEN C. STANWOOD.

SAME *vs.* SAME.

Norfolk. December 11, 1905. — March 1, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Executor and Administrator. Real Action. Limitations, Statute of.

The former decision in this case, reported in 186 Mass. 59, that a writ of entry was prematurely brought by the demandant as administrator to recover land fraudulently conveyed by his intestate, because when the action was brought an appeal was pending from the granting by the Probate Court to the demandant of a license to sell the real estate, governs the case since the correction of the record in accordance with the decision reported in 187 Mass. 531, as it did before that correction.

The provision of R. L. c. 146, § 2, that no claim by an executor or administrator "by entry or by action to land fraudulently conveyed by the deceased shall be made unless within five years after the decease of the grantor," is a statute of limitation which bars all actions brought after the expiration of the prescribed time. R. L. c. 202, § 31, has no application, as it relates only to extensions of the limitations imposed by c. 202.

WRIT OF ENTRY, in the Superior Court dated October 15, 1902, under R. L. c. 146, § 17, for a certain parcel of land in Quincy with the buildings thereon, which the demandant alleged that he was licensed to sell as the administrator of the estate of Isabella S. Whicher, and which he alleged had been fraudulently conveyed by his intestate to the tenant.

WRIT OF ENTRY, in the Land Court dated August 16, 1905, under the same statute between the same parties for the same parcel of land.

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In the action in the Superior Court the demandant by leave of court amended his declaration by alleging the affirmance of the decree of the Probate Court, made on April 16, 1902, by a decree made by a single justice of this court on April 7, 1905. The case was submitted on an agreed statement of facts to *Crosby*, J., who found for the tenant, and at the request of the parties reported the case for determination by this court. If the action was not maintainable judgment was to be entered for the tenant; if the action was maintainable judgment was to be entered for the demandant.

The case in the Land Court was submitted upon an agreed statement of facts to *Davis*, J., who found for the demandant on the ground that the action was seasonably brought, and at the request of the parties reported the case for determination by this court. If the action was not seasonably brought judgment was to be entered for the tenant; otherwise, for the demandant.

C. H. Hanson, (*R. M. Morse* with him,) for the demandant.

S. H. Tyng & J. P. Prince, for the tenant.

KNOWLTON, C. J. The first of these two cases was before this court nearly two years ago, and was reported in 186 Mass. 59. It was then decided that the demandant could not recover because his action was prematurely brought. It is a writ of entry, brought by an administrator to recover from the tenant real estate alleged to have been conveyed to him by the intestate in fraud of her creditors. When it was brought, the demandant had been licensed by the Probate Court to sell the real estate to pay debts, and an appeal had been taken from the decree of that court, which appeal was then pending. More than a year before the first hearing in this court in the case now before us, the exceptions taken before a single justice in the hearing upon the appeal from the Probate Court had been overruled, and a rescript had been sent. At this hearing, reported in 186 Mass. 59, it was assumed both by counsel and the court that the appeal from the decree granting the license to sell had been finally disposed of, and that a decree had been properly entered, founded on the rescript of this court.

Although the case had been finally decided on its merits a long time before, there had been an informality in making the entries of record, and this record was afterwards corrected and

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perfected in accordance with the decision in *Tyndale* v. *Stanwood*, 187 Mass. 531. The request for a ruling which was refused in *Tyndale* v. *Stanwood*, 186 Mass. 59, was as follows: "An appeal having been taken from the decree of the Probate Court, licensing the sale of the property in question, 'all proceedings in pursuance of the act appealed from' were 'stayed until the determination thereof by the Supreme Court of Probate.' As such determination was not made until after the commencement of this action, the same was prematurely brought." A part of the opinion in the case is as follows: "It is urged, however, by the demandant, that even if the license was not operative at the time the writ issued, inasmuch as the exceptions were held unsound and the decree granting a license was finally affirmed by the full court, the affirmation relates back to the time of the appeal, and validates intervening action. While it is true that an order or decree of the Probate Court is not vacated by an appeal but is simply suspended, and upon being affirmed by the Supreme Court takes effect and operates as a decree of the Probate Court and any intermediate action which has been had under the decree is valid, (*Gale* v. *Nickerson*, 144 Mass. 415,) still it is obvious that such intermediate action must be such as, at the time it is taken, is permitted by law, as action taken prior to the appeal. Where the statute declares a decree suspended, there can be no legal action under it. *Arnold* v. *Sabin*, 4 Cush. 46. The time of suspension must be a time of inaction, as well with reference to things not yet undertaken as those partially performed. No other interpretation would give due effect to the suspension or be consistent with the due and orderly administration of the law. It follows that the demandant failed to show so far as material to this action the license necessary to its maintenance, and the tenant was entitled to the ruling that the action was prematurely brought." It seems, therefore, that the counsel in his request, and the court in its opinion, treated the license as having been finally granted under the decision of the full court, and that the case which was then decided by this court was exactly the same as the case now before us. Seemingly the errors and omissions in the record had not then been discovered.

This decision, made after careful consideration, is conclusive

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of the case in its present form. The latest argument of the demandant, made upon the assumption that the former decision is not an adjudication applicable to the case in its present aspect, does not change our opinion quoted above. The demandant relies much upon *Hodges* v. *Kimball*, 91 Fed. Rep. 845, and cases there cited, in which it is held that, if an administrator appointed in another State brings a suit without an appointment as ancillary administrator in the jurisdiction where the suit is commenced, his subsequent appointment there will cure the defect, and relate back to a time before the bringing of the suit. But this is upon the ground that his appointment in the domicil of his intestate gives him a fundamental right, and that the appointment of an administrator always relates back to the time of the death of his intestate, and gives him a title to the personal estate from that time. *Jewett* v. *Smith*, 12 Mass. 309. *Lawrence* v. *Wright*, 23 Pick. 128. *Alvord* v. *Marsh*, 12 Allen, 603, 604.

An administrator has no rights in real estate except those given by statute. His right to sell under a license comes into existence only upon an adjudication by the court of certain facts that make the sale necessary. R. L. c. 146, §§ 6, 7, 9, 10, 12. By the terms of the statute, his only right to bring an action of this kind is "by virtue of such license." R. L. c. 146, § 17. The existence of a valid license is of the essence of his right. Without it he has no title. There can be no license or right to sell if, at any time before it is granted, the persons interested give a proper bond to pay debts and legacies. R. L. c. 146, § 12.

Upon an appeal from a decree granting a license, the decree becomes of no effect in reference to future proceedings, and if it is finally affirmed, a new decree is entered, which takes effect from the time of entry under the order of affirmation. The new decree does not relate back to the time of the original decree appealed from, so as to render illegal all intervening action of owners or others for which there was lawful authority so long as the decree was suspended, and to render legal other intervening action in accordance with the decree, which action was without authority and unlawful so long as the decree was suspended.

The contention that this defence is not open under the pleadings cannot be sustained. The fact that there was no license

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does not go to the personal qualifications of the demandant, but affects his substantive claim of title.

The former decision that the action was prematurely brought governs the case, as well since the correction of the record as before it.

The second case is a new action of the same kind, between the same parties, to recover the same property, brought in the Land Court on August 16, 1905. This action was commenced more than five years after the decease of the demandant's intestate, who was the tenant's grantor, and the only question is whether it can be maintained after the expiration of so long a time.

The last part of the R. L. c. 146, § 2, is in these words: "No claim by entry or by action to land fraudulently conveyed by the deceased shall be made unless within five years after the decease of the grantor." We are of opinion that this is a statute of limitation of actions of this kind, which bars all suits brought after the expiration of the prescribed time. Bringing such an action is making a claim by action, and a claim by action cannot be made unless within five years.

There is nothing in the case which relieves the demandant from this prohibition of the statute. The R. L. c. 202, § 31, is not applicable to proceedings under this chapter, for by its terms it relates only to actions "commenced within the time limited" in chapter 202. The demandant's procurement of a license to sell the property and his bringing of another action prematurely do not enable him effectually to make this new "claim by action," more than five years after the death of the grantor.

According to the terms of the respective reports, the entry in each of the cases must be,

Judgment for the tenant.

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PELLEGRINO RIPPUCCI *vs.* COMMONWEALTH CONSTRUCTION COMPANY.

Suffolk. December 12, 1905. — March 1, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Elevator. Negligence, Employer's liability.

R. L. c. 104, § 27, requiring certain safety devices for elevators whether used for freight or passengers does not apply to a temporary elevator erected and maintained by a contractor for transporting materials used in the construction of a building.

TORT by a workman against his employer, a corporation engaged in erecting a building ten stories in height called the Old South Building on Washington Street in Boston, for personal injuries from the fall of an elevator while the plaintiff was upon it. Writ in the Municipal Court of the City of Boston dated July 8, 1903.

On appeal to the Superior Court, at the trial before *Bell*, J. it appeared that the elevator was used only in transporting materials used in the construction of the building, and that the elevator was not equipped with any safety appliances.

The defendant asked the judge to rule: 1, That on all the evidence the plaintiff cannot recover, 2, that the provisions of R. L. c. 104, § 27, do not apply to this case, and, 3, that, if the jury find that the presence of a safety device would not have prevented the elevator from falling, the plaintiff cannot recover.

The judge refused to make these rulings, and ruled that the elevator was within the provisions of R. L. c. 104, § 27. He ruled that there was no evidence for the jury of negligence of the superintendent, or that the machinery was defective or out of repair except the absence of the safety appliances of the elevator, and so charged the jury. He left to the jury the question whether the want of safety appliances upon the elevator was negligence on the part of the defendant, and if so whether it contributed to the plaintiff's injury.

The jury returned a verdict for the plaintiff in the sum of $1,200; and the judge reported the case for determination by this court. If his rulings and refusals to rule were correct, judgment

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was to be entered upon the verdict. If his ruling as to the application of R. L. c. 104, § 27, to this elevator was incorrect, and that law does not apply, a new trial was to be granted.

C. Hunneman, for the defendant.

M. H. Browne, (*J. M. Browne* with him,) for the plaintiff.

HAMMOND, J. This was an action of tort brought by a servant against his master to recover for injuries received by reason of the fall of an elevator while the plaintiff was upon it. The defendant was a contractor engaged in the construction of a building ten stories in height. In the work of construction it put in the uncompleted building two elevators, which were side by side in an open shaft at the corners of which there were standing upright timbers. They were simply platforms, and were raised and lowered by a steel cable which ran over a sheave at the tenth story and thence back to an engine in the basement. They were controlled by bells at the engine, of different tones for the different elevators. These bells were struck by "touch buttons" at each story. So far as appears, the elevators were used only for transporting materials used in the construction of the building. We understand that these elevators were not a part of the building as ultimately to be constructed, but were simply contrivances temporarily used in its construction.

The principal question is whether the provisions of R. L. c. 104, § 27, are applicable to elevators temporarily maintained by builders for the transportation of materials used in the construction of the building in which the elevator is set up. The section, which is somewhat long, reads as follows: "Elevator cabs or cars, whether used for freight or passengers, shall be provided with a suitable mechanical device by which they will be securely held in the event of an accident to the shipper rope or hoisting machinery, or any similar accident, and they shall be guarded and equipped with some attachment or device fastened to the elevator cab or car, elevator well, or floor of the building, which shall prevent any person from being caught between the floor of the cab or car and the floor of the building while attempting to enter or leave the elevator. Elevators used for carrying freight shall be equipped with a suitable device which shall act as a danger signal to warn people of the approach of the elevator.

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Elevator wells hereafter built shall be so constructed that that part of the inside surface of the well which comes in front of the opening or door of the cab or car shall be flush with the cab or car, and the door opening from said elevator well into the building shall be placed not more than two inches back from the face of said well, so as to allow no space for a foothold between the car and well door of the building. All the above construction work and devices shall be approved by the inspectors of factories and public buildings, except that in the city of Boston they shall be approved by the building commissioner, and in other cities by the inspector of buildings; but, upon the approval of said commissioner, or inspector of buildings, or inspector of factories and public buildings, any elevator may be used without any or all of such appliances or devices if the nature of the business is such that the necessity for the same will not warrant the expense."

It becomes necessary to look to some extent into the history of the legislation on this subject. St. 1877, c. 214, § 2, is as follows:

"In any manufacturing establishment in which there shall exist or be placed any hoistway, hatchway, elevator or well-hole, the openings thereof through and upon each floor of such establishment shall be provided with and protected by good and sufficient trap-doors, or self closing hatches and safety-catches, or such other safeguards as the inspectors hereinafter mentioned shall direct; and all due diligence shall be used to keep such trap-doors closed at all times, except when in actual use by the occupant or occupants of the building having the use and control of the same."

This section appears in a statute entitled "An Act relating to the inspection of factories and public buildings." The language of this section, taken in connection with the purpose and scope of the whole statute, shows that the section was not intended to apply to a "hoistway, hatchway, elevator or well-hole" which was temporarily maintained simply as one of the contrivances used in the construction of a building. The section is plainly dealing with a building ready for occupancy, and not with such conditions as may temporarily arise in its construction.

This section is inserted in substance in Pub. Sts. c. 104, § 14.

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Here also it is found in a statute entitled "Of the inspection of buildings"; and, for reasons similar to those above alluded to, it is plain that the section has no wider application than before. By St. 1882, c. 208, the section was amended by extending its applicability to any "mercantile or public building," and by adding to the end the following: "All elevator cabs or cars, whether used for freight or passengers, shall be provided with some suitable mechanical device, to be approved by the said inspectors, whereby the cabs or cars will be securely held in the event of accident to the shipper rope, or hoisting machinery, or from any similar cause." Although the language of this amendment seems broad enough to cover any kind of elevator, whether the same be a part of the building as constructed for use or be only one of the rough mechanical contrivances temporarily used in the construction, yet we think that the section as thus amended does not refer any more than it did before to the latter class of elevators. As before the amendment, so afterwards it must be held to apply only to the former class. The statute is still dealing with a building as such, and not with implements and contrivances temporarily used in its construction.

The building laws were codified in St. 1894, c. 481, and the provisions of Pub. Sts. c. 104, § 14, as amended by St. 1882, c. 208, were then placed in two sections (§§ 41, 42), the first of which (§ 41) contained the provision relating to "hoistways, hatchways, elevators and well holes," and the second (§ 42) related to elevator cabs or cars, and was substantially the same as the amendment which was placed at the end of Pub. Sts. c. 104, § 14, by St. 1882, c. 208. There is nothing in this codification showing any intention on the part of the Legislature to extend the scope of the provisions under consideration. St. 1894, c. 481, § 42, was finally amended by St. 1901, c. 439, so as to be substantially the same as R. L. c. 104, § 27, which is the section in question.

It will be observed that this last is a part of a system devised for the inspection of buildings as were the various similar sections preceding it. The whole statute of which it is a part plainly is dealing with the features of a building as such, and many of its sections cannot refer to a building in process of con-

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struction. For instance, take § 25 as to fire escapes. And the provisions contained in the section under consideration with reference to the inside surface of an elevator well manifestly are not intended to apply to a skeleton structure like the one which may be used as part of the ways and means of construction.

Taking into consideration the history of this kind of legislation and the language and setting of the section, we are of opinion that it does not apply to an elevator temporarily used as a part of the ways, works and machinery in the construction of a building. We find no case in our own reports where there has been a claim for injuries received upon such an elevator. In every case the elevator has been a part of the building as such. The ruling that the provisions of this section applied to this elevator was wrong. By the terms of the reservation therefore, a

New trial is granted.

CAROLINE HERTHEL, administratrix, *vs.* JOHN W. McKIM, Judge of Probate.

Suffolk. December 13, 1905. — March 1, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Executor and Administrator. Attachment.

Under our statutes the real estate of a deceased person may be attached on mesne process in an action against the administrator of his estate to collect a debt of the deceased.

PETITION, filed on August 23, 1905, by the administratrix with the will annexed of the estate of Frederick J. Herthel, who died testate on January 2, 1904, to dissolve a general attachment upon all the real estate in the county of Suffolk of which the testator died seised and possessed, made in an action brought against the petitioner and a son of the testator by the judge of the Probate Court of the county of Suffolk for the benefit of Eliza Parkman Rhett, a creditor of the testator.

The allegations in the petition seem to have been treated as true. The petition stated that the estate of Frederick J. Herthel was given by his will to the petitioner as residuary devisee and

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legatee after the payment of certain small legacies; that the testator left a small amount of personal property, a large amount of real estate, and debts to the extent of about $20,000; that the personal estate was not over $2,000 in value; that the real estate had a net value of $55,000 after deducting mortgages; and that it therefore would be necessary to sell a substantial part of the real estate to pay debts and legacies.

In the Superior Court *Lawton*, J. ordered that the attachment on the real estate be dissolved. The respondent appealed.

F. H. Williams, for the respondent.

G. L. Wilson, for the petitioner.

KNOWLTON, C. J. This case presents the single question whether a creditor of the estate of a deceased person can attach the real estate of the deceased on a writ against the administrator.

The R. L. c. 178, § 53, provides that "land of a deceased person may be taken on execution on a judgment against his executor or administrator for the debt of the deceased." Another section declares that "All real and personal property which is liable to be taken on execution, except . . . may be attached upon the original writ in any action in which debt or damages are recoverable, and may be held as security to satisfy such judgment as the plaintiff may recover." R. L. c. 167, § 38. The exceptions referred to in the statute are not material to this question. Under these two sections, property, both real and personal, belonging to the estate of a deceased person, may be attached on mesne process in any suit for a debt of the deceased, properly brought against the executor or administrator. The R. L. c. 172, § 5, also expressly recognizes the right of creditors to attach property of a deceased person, in actions against the executor and administrator, for his debts.

Attachments are dissolved by the decease of the defendant during the pendency of the action. R. L. c. 167, § 112. No action, except for necessaries, can be brought against the estate of a deceased person until the expiration of a year from the appointment of the executor or administrator. R. L. c. 141, § 1. As against ordinary claims, therefore, the executor or administrator has a year, after his appointment, within which to collect the assets and pay the debts, and, if the property is insufficient

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to pay them in full, to represent the estate insolvent. After the commencement of proceedings in insolvency no action can be brought against him by a creditor, and, if an action has been brought before the commencement of such proceedings, no execution can be obtained in it. R. L. c. 142, §§ 30, 31, 32. It is therefore impossible for a creditor, by bringing an action and making an attachment on mesne process, to obtain any improper preference over other creditors. There is no good reason why the general provisions relating to attachments should not apply to actions against the estates of deceased persons as well as to others. The statutes are broad enough to cover such cases, and attachments in them have been common.

The subject was considered in *Harmon* v. *Osgood*, 151 Mass. 501, and it was held that an action might be brought and an attachment made against an administrator by trustee process, in which a person, having property belonging to the estate, might be summoned and held to answer to the creditor. That case is decisive of the one at bar.

There is no good ground for the contention that, under this petition, the order was made as a matter of discretion, because the attachment was excessive or unreasonable. The petition sets forth the conditions in regard to the real estate, and avers "that said attachment is therefore wrongful, illegal, unreasonable and against the policy of the laws and statutes of this Commonwealth." The prayer for a discharge of the attachment purports to be founded on this averment, and the order must be assumed to have been made for these reasons.

Petition dismissed.

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LETITIA B. EVANS *vs.* CITY OF BOSTON.

Middlesex. December 13, 1905. — March 1, 1906.

Present: KNOWLTON, C. J., MORTON, LORING, & SHELDON, JJ.

Municipal Corporations. Boston.

A taking by the street commissioners of the city of Boston under St. 1897, c. 426, by an order locating a new channel for the Neponset Avenue branch of Stony Brook, of "the right to maintain said new channel and other sewerage works" in the land described, includes the right of using the channel for a house sewer.

PETITION, filed March 24, 1904, alleging that on and before June 27, 1899, the petitioner was the owner in fee of a certain parcel of land in that part of Boston called Roslindale; that she has continued to be the owner of this parcel of land subject to the easement of "the relocation of the Neponset Avenue branch of Stony Brook" through said land by an order of the board of street commissioners of the city of Boston passed on June 27, 1899; that on December 21, 1903, the respondent took an additional easement to enable it "to build sewerage works" through this parcel of land; that the petitioner being aggrieved by such taking for sewerage works, for which taking she has not received from the respondent any compensation, petitions that her damages for the taking for sewerage works may be assessed by a jury. There followed a description of the land.

In the Superior Court the case was heard by *Bond*, J. upon an agreed statement of facts.

It appeared that on June 27, 1899, the street commissioners made the taking through the petitioner's land which is described in the opinion; that in 1900 a trench was dug; that on May 22, 1900, the street commissioners notified the city auditor that the petitioner had been awarded $283; that on May 29, 1900, the petitioner signed a release which is described in the opinion, and on June 1, 1900, the award was paid upon the petitioner's order; that on November 30, 1903, it was decided by the proper authorities of the city to construct a sewer through a portion of the strip of land in which the above mentioned easement had been taken,

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and on December 11, 1903, the superintendent of streets of the city filed in the registry of deeds a notice of his intention to construct such a sewer; that in the spring and summer of 1904, the respondent enlarged the trench already dug and constructed and laid the pipe for the branch of Stony Brook and the pipe for the house sewer within the limits of the strip previously taken.

The judge found for the petitioner, and assessed damages in the sum of $250. The respondent appealed.

P. Nichols, for the respondent.

H. H. Smith, for the petitioner.

LORING, J. The board of street commissioners of the city of Boston, acting under St. 1897, c. 426, located a new channel for the Neponset Avenue branch of Stony Brook on land of the petitioner, and took "the right to maintain said new channel and other sewerage works in said land."

It was held in *Atkins* v. *Boston*, 188 Mass. 77, that under such a taking the city had a right to use the channel for sewerage purposes which includes a right to use it for a house sewer.

The petitioner's objection is that the notice of the hearing under which the taking in question was made was a notice "that this board are of the opinion that public necessity and convenience require that the stream or watercourse, at West Roxbury, known as the Neponset Avenue branch of Stony Brook, be located anew from Sharon Street to the main channel of Stony Brook near Florence Street, that any parts of the original channel from which said watercourse may be diverted between said points be filled up, and that lands be taken for said purpose," and that at the hearing held in pursuance of this notice those who attended in the plaintiff's behalf "learned . . . that the easement to be taken was to be solely for the relocation of the Neponset Avenue branch of Stony Brook."

Were there anything in this objection the petitioner cannot set it up, since she has accepted the $283 awarded her as compensation for the taking made, and has released the respondent "of and from all claims and demands whatever, for damages, costs, expenses, and compensation for, on account of, or in any way growing out of the relocation of the Neponset Avenue branch of Stony Brook through said parcels of land by an order of the

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board of street commissioners of said city of Boston passed June 27, 1899." By that order the respondent took "the right to maintain said new channel and other sewerage works in" the lands taken.

But there is nothing in the objection. The notice which begins as stated by the petitioner ends with the statement that the board "intend to take the action so required under the provisions of Chapter 426 of the Acts of the Legislature of 1897." The only purpose for which land can be taken under St. 1897, c. 426, is "for sewerage works."

Judgment reversed; judgment for the respondent.

JOSIE CASWELL, administratrix, *vs.* BOSTON ELEVATED RAILWAY COMPANY.

Middlesex. December 13, 1905. — March 1, 1906.

Present: KNOWLTON, C. J., MORTON, LORING, & SHELDON, JJ.

Negligence. Street Railway.

In an action against a street railway company under R. L. c. 111, § 267, for causing the death of the plaintiff's intestate by the negligence of the defendant or the unfitness or gross negligence of its agents or servants, it appeared that at an early hour in the morning the intestate was driving a milk wagon from an intersecting street across the tracks of the defendant when his team was struck by a car of the defendant transporting coal to its power house. The evidence warranted findings, that the intestate was in the exercise of due care, that the motorman saw the team shortly before it reached the tracks, and on seeing it tried to stop his car, and that the accident was caused by the failure of the motorman to keep a proper lookout, or to check his car in time, or by both of these things. *Held*, that a trial judge sitting without a jury was right in refusing to find that the negligence of the motorman was gross within the meaning of the statute.

In an action against a street railway company under R. L. c. 111, § 267, for causing the death of the plaintiff's intestate by the negligence of the defendant or the unfitness or gross negligence of its agents or servants, it is right to refuse to make a ruling that "if the motorman of the defendant was operating its car at the time of the accident at a rate of speed in excess of that allowed by law, then that fact is *prima facie* evidence of gross negligence," although this fact in connection with other facts would be evidence of a failure to exercise ordinary care.

A street railway company, although not authorized to engage in the business of carrying freight for others, lawfully may run cars loaded with coal over its tracks for the purpose of supplying its power house.

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Semble, that an employee of a street railway company, sometimes called the trolley man, whose duty it is to stand at the rear end of a car used for transporting coal to the power house of the company and look out for the trolley strings, also to turn the switches, and to load and unload the coal, may be found not to be a conductor of the car within the meaning of St. 1897, c. 343, providing for the licensing of conductors of street cars by the board of police commissioners of the city of Boston.

In an action against a street railway company under R. L. c. 111, § 267, for causing the death of the plaintiff's intestate by the negligence of the defendant or the unfitness or gross negligence of its agents or servants, in running a car of the defendant into a team which the plaintiff's intestate was driving from an intersecting street across the defendant's tracks, if it appears that the conductor of the car was negligent in not having obtained a license from the police commissioners of the city of Boston under St. 1897, c. 343, but that the car was so constructed that the conductor from his position at the rear could not see teams coming in front, and the only negligence that caused the accident was that of the motorman, the negligence of the conductor in failing to obtain the license is immaterial and does not affect the liability of the defendant.

The violation by a motorman of an ordinance of a city requiring every person having the control of the speed of a street railway car to keep a vigilant watch for all teams, carriages and persons, under R. L. c. 112, § 40, which imposes a penalty on a street railway company whose servants and agents wilfully or negligently violate regulations of the board of aldermen of a city as to the rate of speed allowed in its streets, does not constitute negligence on the part of a street railway corporation as distinguished from negligence of its agents and servants within the meaning of R. L. c. 111, § 267.

KNOWLTON, C. J. This is an action, brought under the R. L. c. 111, § 267, to recover damages for the death of the plaintiff's intestate. To recover under this section a plaintiff must show that the death was caused either by the negligence of the corporation, or the unfitness or gross negligence of its agents or servants while engaged in its business. In this case the death was caused by a collision between a covered milk wagon, which the plaintiff's intestate was driving, and a car of the defendant in which coal was being transported. It occurred at about half past four o'clock in the morning of May 2, 1901, at the junction of Harrison Avenue and East Newton Street in Boston. These streets cross each other at right angles on a level, and, at the time of the accident, the horse drawing the milk wagon was going at a trot through East Newton Street across the railway tracks on Harrison Avenue, while the car was passing along the track.

The judge who tried the case without a jury found that the plaintiff's intestate was in the exercise of due care, and that the accident was caused by the negligence of the motorman, but that

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his negligence was not gross. He found that the evidence did not warrant any inference that the motorman was unfit for his position on the car in question. He also found that the motorman saw the team shortly before it was about to enter upon the tracks, that on seeing the team he endeavored to stop his car, and that the accident was caused by the failure of the motorman to keep a proper lookout, or to check his car seasonably, or by both causes acting conjointly. The judge ruled that there was no negligence of the corporation within the meaning of the R. L. c. 111, § 267. He found for the defendant, and reported the case for determination by this court.

Without reviewing the evidence, it is sufficient to say that all of these findings were well warranted, and that the judge was right in declining to find that the negligence of the motorman was gross, within the meaning of the statute. In the second, fifth and sixth requests for rulings,* the judge was asked to decide, under each, that a certain fact, if found, was *prima facie* evidence of gross negligence. Each of these facts, taken in connection with other testimony, was some evidence of a failure to exercise ordinary care, but no one of them was evidence of gross negligence.

The plaintiff relies upon the fact that, at the time of the accident, the car was being used to transport coal to the defendant's power house, and contends that a use of the street in this way was unlawful.

It is true that the defendant is incorporated for the transportation of passengers, and that it is not authorized to engage in the

* The rulings requested by the plaintiff and refused by the judge were as follows: "1. If the defendant had no authority to operate its coal car on Harrison Avenue, then that fact is *prima facie* evidence of negligence. 2. If the motorman of the defendant was operating its car at the time of the accident, at a rate of speed in excess of that allowed by law, then that fact is *prima facie* evidence of gross negligence. 3. If the conductor on the car was not licensed by law to operate a car, then that fact is *prima facie* evidence of negligence on the part of the defendant. 4. On all the evidence in this case the plaintiff is entitled to recover. 5. If the motorman did not see the horse of the deceased until he was about to enter on the tracks, that fact is evidence of gross negligence on the part of the motorman. 6. If the motorman after seeing the team of the deceased, could have stopped his car, and he did not do so, that fact is evidence of gross negligence on his part."

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business of carrying freight for others. R. L. c. 112, § 2. If the accident had been caused by an unlawful use of its tracks and cars in carrying freight for hire, the defendant might well have been found guilty of negligence; but the construction, maintenance and management of a street railway involve the use, at different times, of many kinds of material, at different places along its lines, and a street railway corporation has the same right that any one else has to use the streets in a reasonable way, in the transportation of anything which it is reasonably necessary to transport as incidental to the proper management of its legitimate business. It must lay its rails and the timber supporting them, and if a reasonable way of bringing them near the place where they are to be laid, either for original construction or for repair of the tracks, is upon cars propelled over their tracks, it is not unlawful so to bring them. If power houses in which coal is burned for the production of electricity, to be used as power, are necessary at different points on its lines, such a corporation may maintain them, and supply them with coal by carrying it in cars along its track, if that is a reasonable way of doing the business. The provision of R. L. c. 112, § 55, goes further, and authorizes the carrying of material for the construction or repair of streets, even when it is not incidental to the maintenance or operation of the railway.

We find nothing in this case to show that the defendant was negligent in using coal cars upon its tracks. The first request for rulings was rightly refused, as not founded upon any evidence in the case.

The third request refers to the evidence that the trolley man or conductor of the car was not licensed, under the St. of 1897, c. 343, § 1. This was rightly refused. Upon the evidence the judge well might find that he was not a conductor within the meaning of that statute. He did not have control of the car as conductors do. The motorman was in charge of the car. It was his duty to stand at the rear end of the car and look out for the trolley strings, and also to turn the switches, and load and unload the coal on the car. He was sometimes called the trolley man. His duties did not correspond generally with those of a conductor.

But even if there was negligence in his failure to obtain a

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license, there was no evidence that this negligence had any connection with the accident. The car was so constructed that, from his position at the rear, he could not see teams coming in front. The only negligence that caused the accident was that of the motorman. Negligence as to the license of this conductor or trolley man imposed no liability for this accident upon the defendant.

An ordinance of the city of Boston was introduced, which makes it the duty of every person having the control of the speed of a street railway car to keep a vigilant watch for all teams, carriages and persons, etc., and the plaintiff contends that negligence of the motorman, under this ordinance, and under R. L. c. 112, § 40, is negligence on the part of the corporation, within the meaning of R. L. c. 111, § 267. It is true that under § 40, just cited, the corporation is subject to a forfeiture founded on the negligence of its servants or agents. This provision rests on grounds of public policy, and it does not imply criminal conduct on the part of the corporation, or corporate negligence as distinguished from the negligence of servants or agents within the meaning of the distinction in the R. L. c. 111, § 267. The plaintiff cannot prevail on this contention.

We are of opinion that there was no error at the trial.

Exceptions overruled.

J. J. Scott, for the plaintiff.

A. P. Stone, for the defendant.

JOHN R. WHITNEY & another, trustees, *vs.* COMMONWEALTH.

Middlesex. December 14, 1905. — March 1, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Damages, For property taken under statutory authority. *Metropolitan Park Commission. Parks and Park Commissioners. Practice, Civil*, New trial, Verdict.

Under St. 1894, c. 288, § 5, providing for the assessment of damages from the taking of land or any right therein by the metropolitan park commissioners for the construction of roadways and boulevards, one whose land is damaged by the

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taking of other land for the purposes named in the act may recover damages although no part of his own land is taken. Following *Hyde* v. *Fall River*, 189 Mass. 439.

On a petition under St. 1894, c. 288, § 5, for the assessment of damages from the taking by the metropolitan park commissioners of land near that of the petitioner for the construction of a boulevard, it appeared that the only land of the petitioner shown to have suffered special and peculiar damage was land used as a mill pond adjacent to the park. The petitioner asked the presiding judge to make various rulings relating to the right of access from his land to the boulevard under the rules of the park commissioners, which could be material only in reference to the possible future use of the land after a change in its condition by filling. The judge instructed the jury that if the land should be filled and cut into building lots with separate ownership, the owners would have a right of access from their lots to the boulevard, that the rules of the park commissioners were and would be valid only so far as they were reasonable, and that rules that were reasonable under certain conditions might not be reasonable under different conditions. *Held*, that the petitioner was not aggrieved by the failure of the judge to instruct the jury more fully as to the rules of the park commissioners in their application to the petitioner's land either in its present condition or in its conjectural future condition.

Whether a rule of park commissioners is reasonable and binding as applied to known facts is a question of law, but where the facts are in dispute or uncertain it is a question to be decided by a jury under proper instructions.

On a motion for a new trial, on the ground that before the returning of the verdict the judge communicated with the jury during an adjournment of the court in the absence of counsel, it appeared that the case was a petition for the assessment of damages to the petitioner's land from the construction of a boulevard by the metropolitan park commissioners, and that four issues were submitted in writing to the jury two of which were to be answered by giving nominal damages and the other two by filling in such damages as the jury might find, that, after the adjournment of the court, at about nine o'clock in the evening the judge at his house out of town was notified by telephone by the court officer in charge of the jury, that the jury had agreed on the amount of damages but did not understand which of the forms were to be used for filling in the nominal damages and which for the amount found by them, that the judge by telephone directed the officer to bring the jury to the room in the court house in which the telephone was, that the officer did so, there being no one present in the room except the officer and the members of the jury, and that thereupon the judge by telephone explained to the foreman, who repeated the explanation to the jury, which forms were intended for the nominal damages and which for the amount found by them, that the jury then returned to their room and filled out the forms, which were signed by the foreman and sealed in the usual manner and the next morning were returned into court by the jury, when the verdict was affirmed. *Held*, that, although such communications with a jury are open to grave objections on account of the possibility of misunderstanding or mistake, in this case as no miscarriage of justice had resulted the communication did not require the court to set aside the verdict.

KNOWLTON, C. J. This is a petition for an assessment of damages growing out of a taking of land in Winchester by the metropolitan park commissioners in 1898, under the authority of

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Sts. 1894, c. 288, and 1895, c. 450. The first question is whether the petitioners are entitled to a substantial sum or only to nominal damages. In the original taking a strip of the petitioners' land seven feet wide, on the northerly side of Walnut Street, was included, and this gave the petitioners a vested right to compensation for the land taken, and also for damages caused to their remaining land. But this right was subject to the right of the park commissioners, under the St. of 1895, c. 450, § 2, to abandon any portion of the land taken, and to have this abandonment pleaded in reduction of damages for the taking, in any suit brought to recover therefor. The park commissioners subsequently abandoned this strip and reconveyed it to the petitioners. In answer to a question submitted to them by the presiding judge, the jury found, under instructions, that the damage for the taking of this strip, in connection with the subsequent abandonment of it, was only nominal.

The whole of Walnut Street on which the petitioners' land abutted was included in the taking, and there was a question, at the trial, whether the fee to the centre of this street was owned by the petitioners, or whether they owned only to the northerly line of the street. This depends upon the construction of their deed, which we do not find it necessary to consider; for the jury, in answer to the special question submitted to them, found that the damage to the petitioners' property, including that to their remaining land, was the same, whether their boundary line was at the centre of the street or at the side of it. If the petitioners are entitled to damages for the diminution in value of their remaining land, without reference to their ownership of the fee of the street which was taken, it is of no consequence, under these findings, whether they had a title to the land in the street or not.

Since the decisions in *Sheldon* v. *Boston & Albany Railroad*, 172 Mass. 180, and *Hyde* v. *Fall River*, 189 Mass. 439, we consider it settled that one whose land is damaged by a taking of other land for a public use under statutes like that now before us may recover his damages, even though no part of his own land is taken. The language of the St. of 1894, c. 288, § 5, which provides for damages for this taking, is substantially the same as that of the St. of 1890, c. 428, § 5, under which the cases just

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cited were decided. The adjudication in *McSweeney* v. *Commonwealth*, 185 Mass. 371, is not inconsistent with this view. In that case no injury was done to the petitioners' land by the taking of other land and the appropriation of it to a public use. In the course of the work there was merely a digging up and obstruction of a drain in the land taken, which was there without legal right.

The application of this rule makes it unnecessary to consider whether, if the rule were otherwise, the right to receive the damages to their remaining land, which resulted from the taking of the strip seven feet wide, would continue after the abandonment of that strip by the park commissioners. Upon the undisputed facts and the findings of the jury, the petitioners are entitled to recover substantial damages.

The petitioners made many requests for rulings, some of which were refused. The first eight requests were given in substance, and no exception was taken in regard to them. The exception to the failure to grant in terms the ninth and tenth requests is sufficiently answered by the fact that the judge explained the statutes, substantially in accordance with these requests.

The requests numbered from eleven to fifteen inclusive relate to the right of access from their land to the boulevard, under the rules of the park commissioners, and the requests from number twenty-five to number thirty-four inclusive relate to the rights of the petitioners under other rules of the park commissioners. In reference to all these requests it is to be noticed, first, that the only land of the petitioners which is shown to be so situated that it might suffer special and peculiar damages from the taking and use of the land of others for a park, as distinguished from damages to the public generally, is the land used as a mill pond, adjacent to the park on the northerly side. In its present condition, and so long as it is devoted to its present use, the land is such that no one of these requests appears to be applicable. It is not shown that these rules and regulations have any bearing upon the subject of damages to land so used. It is only in reference to a possible use of another kind, after a change in the condition of the land by filling, that any of these matters become material. The judge gave correct general instructions in regard to these possible future conditions, and this was all that he could

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properly do. He was right in telling the jury that, if the land should be filled and divided into building lots, in separate ownership, between the boulevard and other parts of the pond, the owners would have a right of access from their lots to this boulevard, which is a public way. He was right in telling them that the rules and regulations were then valid and would be valid in the future only so far as they were reasonable, and that rules which were reasonable under certain conditions might not be reasonable under different conditions.

We are of opinion that the petitioners are not aggrieved by the failure of the judge to instruct more fully as to the rules and regulations, in their application to the petitioners' land in its present condition. We also think that he could not profitably give more definite instructions as to the rules as applied to future unknown possible conditions. Whether a rule is reasonable and binding, as applied to known facts, is a question of law, but where facts are in dispute or uncertain, such a question must be decided by a jury, under proper instructions.

In this case the facts and circumstances bearing upon the reasonableness of many of these rules, in their application to this park at the time of the trial, are not disclosed by the record, in such a way as to show any error of the judge in refusing to rule as matter of law upon the effect of the rules. Much less could he properly rule as matter of law what rules would be reasonable and what unreasonable in the future, when a part of the petitioners' mill pond may be made into building lots, and other conditions may be greatly changed. Upon the meagre evidence on this subject which appears in the record, the judge was not called upon to rule more particularly upon these regulations.

The exception to the refusal to give the rulings requested, numbered nineteen, twenty, twenty-two and twenty-three, must be overruled. The general instructions given, and the submission of questions to the jury, together with the answers thereto, saved all the rights of the petitioners.

The judge, with the consent of counsel, submitted to the jury four questions to be answered. Two of them called for their assessment of damages for the taking, in connection with the subsequent abandonment, of the strip seven feet wide, the first

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upon the theory that the petitioners' land extended into Walnut Street, and the second upon the theory that the petitioners' land extended only to the northerly line of Walnut Street. The other two called for an assessment of damages to all the petitioners' land, on the assumption that they might recover not only for the land taken, but for the diminution in value of the remaining land; the first of these questions being framed on the theory that the petitioners' land extended into Walnut Street, and the second upon the theory that it extended only to the northerly line of Walnut Street. At the close of the evidence the jury were instructed to return verdicts for only nominal damages for the taking of the strip seven feet wide.

After the end of the regular session for the day, the case having been submitted to the jury early in the afternoon, the judge remained for a considerable time, and before he left the court house the jury came into court, which was still open, and stated that they did not understand which forms of issues were to be filled in with nominal damages, and which were those requiring the insertion of the damages to be found by them. The statement in the record goes on as follows:

"The justice explained to them about the terms and meaning of the issues as framed, and then, to avoid misunderstanding, he called the foreman to the side of the desk and spread out the four papers, and read them aloud so that the other jurors in the jury seats could hear everything that took place, and showed the foreman the questions and designated the particular ones that were to be answered for nominal damages and those that were to be answered by inserting the amounts found by the jury. He then asked the foreman if he understood this, and the foreman said he did.

"When later the justice left the court house, he told the officer in charge of the jury, in case the jury should have any difficulty about the form of the issues, and should so inform him, to telephone to him, the justice, and if necessary, he would leave his home in Newton and come to Cambridge, and directed the officer, if the jury notified him that they had agreed, to ask the foreman if the jury found any difficulty about the form of the issues.

"About nine o'clock in the evening, the justice was informed

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by the officer over the telephone that the jury had notified him that they had agreed, and were proceeding to write the answers to the issues, and that the officer pursuant to the justice's direction, had asked the foreman if they understood which forms required the different answers. The foreman answered that they were in doubt as to which set of answers to insert in the two sets of questions. The justice then directed the officer to ask the jury this question, which the officer took down in writing and read to the jury: 'Do you understand which questions you are to answer by nominal damages, and which the other way?' The foreman said to the officer in reply that they did not clearly understand this, and were in doubt about it.

"The judge's house was about nine miles from the court house by the usual route of travel, and between two and three hours would have been occupied in going to the court house and returning at that time of night. If the jury had been kept over night, they would have been unfit for service the next day.

"In view of this, after consideration, the judge directed the officer to take the jury to the room in the court house at Cambridge where the telephone was. This room is the County Treasurer's office, and at that hour of the night was unoccupied. This was done. All the members of the jury were taken there together by the officer, and no other person except the jurors and the officer was present.

"The foreman then in the hearing of all the members of the jury stated to the judge by telephone that the jury had agreed upon the amount of damages, and were about to fill in the findings, but they were not sure which papers required the amount they had agreed upon as damages, and which papers were designed for the nominal amount, and did not clearly remember which papers the judge had stated were for the amount to be found as damages and which for the nominal amount. The foreman made no statement as to the amount agreed upon as damages, and the amount was unknown to the judge. The foreman made no other statement to the judge.

"The judge directed the foreman to read to him over the telephone in the hearing of the jury each of the forms, and said forms were so read to the judge by the foreman over the telephone in the hearing of the jury; and the judge as the same

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were read designated which forms were intended for the damages found and which were intended for the nominal damages, by saying, 'That form is for the amount the jury finds' and 'That form is for nominal damages' as the forms were read, and the designation so made by the judge was repeated to the jury by the foreman. The judge heard over the telephone this repetition, made by the foreman to the jury. The forms designated by the judge for the damages found by the jury and for nominal damages were the same he had previously designated, as above stated, but the judge made no comment or explanation in regard to them, nor any statement except to point out by the language above used which were the forms for the damages found by the jury and which were for nominal damages. No one was present with the jury except the officer in charge. The jury then returned to their room under the charge of the officer and completed filling out the forms, and they were filled out, and were signed by the foreman, sealed in the usual manner, and the next morning were returned into court by the jury, and the verdict was then affirmed.

"No conversation other than the above took place over the telephone. The jury were within hearing of everything said by the foreman, and the foreman repeated to the jury everything said by the judge, and no direction, statement, explanation or ruling was made or given or language used by the judge, in any way referring to or bearing upon the questions to be passed upon by the jury in the case, nor any explanation of the issues nor of the meaning of them."

The petitioners filed a motion for a new trial, founded on this communication with the jury, and at the hearing upon it presented the following requests for rulings:

"1. If after the case was committed to the jury and after and during an adjournment of the court in the absence of counsel, the presiding justice communicated with the jury or some member or members thereof the petitioners are entitled to a new trial.

"2. If after the case was committed to the jury and after the court had adjourned and during such adjournment in the absence of counsel the presiding justice instructed the jury or any member thereof in reference to the question of damages the petitioners are entitled to a new trial.

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"3. If after the case had been committed to the jury, in the absence of counsel, during an adjournment and not in open court the presiding justice explained to the jury or any member or members thereof all or any of the questions which had been left to them the petitioners are entitled to a new trial.

"4. If the officer in charge of the jury after the case was committed to them delivered to or read to the jury or any member or members thereof any communication from the presiding justice or any other person which might in any way influence their verdict the petitioners are entitled to a new trial.

"5. The officer had no right to communicate with the jury in the manner and form in which he did.

"6. The presiding justice had no right to communicate with the jury in the manner and form in which he did."

"The court gave so much of request numbered 1 as relates to communication by a justice with some member or members of the jury, and so much as may relate to any communication affecting the deliberations of the jury or their action, or to any ruling, statement or comment upon any question they are to pass upon, or any language used with reference thereto, but declined to give the remainder of the request or to rule that any communication between the justice and the jury would entitle the petitioners to a new trial. The court gave the second, third and fourth requests and declined to give the fifth and sixth, and denied the motion, and the petitioners excepted so far as their requests were not given."

In dealing with these requests the presiding judge ruled, in substance, that a communication with some member or members of the jury, under the circumstances stated in the first request, would be unlawful, although a communication with the jury as a body might be justified. He also made a similar distinction between a communication affecting the action or deliberations of the jury, or relating to any ruling, statement or comment upon any question they are to pass upon and a communication for some other proper purpose. The direction that he gave was merely as to the proper way to exhibit and preserve their verdict on paper, after they had decided upon it, so that there might be no mistake in presenting it to the court. The communication was, in principle, not very different from the common direction, given through

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the officer to a jury who agree in the night time, to seal up their verdict and bring it into court the next day. *Commonwealth* v. *Heden*, 162 Mass. 521. It went a little further in telling them how to use the machinery that had been provided for that purpose, but the information was limited to assistance in the use of this machinery, and did not touch any matter that could affect the substance of the verdict itself, before it was agreed upon.

There are grave objections to any communication with a jury made as this was. The possibility of misunderstanding or mistake involved in it is such as should preclude the adoption of it, unless in cases of great emergency; but the facts stated in this case make it certain that no miscarriage of justice has resulted. Limited as this communication was to a collateral direction as to the manner of using the papers supplied for the reception of the verdict, it does not require us to set the verdict aside.

If there had been no communication from the judge, and the jury had made a mistake in filling the blanks in the paper furnished them, the mistake might have been corrected after their return of the verdict to the court. *Levine* v. *Globe Street Railway*, 177 Mass. 204. *Spencer* v. *Williams*, 160 Mass. 17, and cases cited. *Twomey* v. *Linnehan*, 161 Mass. 91, 95. The present case is covered in principle by *Moseley* v. *Washburn*, 165 Mass. 417, where a similar communication was made by the judge to a jury, through the officer who had them in charge, and the verdict was upheld.

Judgment on the verdict for the large sum.

C. F. Jenney & S. Robinson, for the petitioners.

R. G. Dodge, Assistant Attorney General, & *A. Marshall*, for the Commonwealth.

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HENRY BIGELOW WILLIAMS & another, trustees, & others *vs.* CITY OF BOSTON.

Suffolk. December 14, 15, 1905. — March 1, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Westminster Chambers. Damages. Copley Square.

At the trial of a petition under St. 1898, c. 452, § 4, by the owners of the building called the Westminster Chambers in Boston for damage or loss to their real estate by reason of the limitation of the height of buildings on and near Copley Square imposed by § 1 of that statute, the presiding judge in his discretion may admit evidence of the value of the building as planned before the limitation of height and of its value as finished under that limitation, of the rental value of the two, and of the cost of completing the building in connection with evidence showing that completing the building was the best thing to do and that the cost so incurred was reasonable.

The provision of St. 1896, c. 313, § 1, accepted by the city council of Boston, limiting the height of buildings bordering on a park where the park commissioners have established a building line to seventy feet does not apply to the buildings on a square where such a building line has not been established.

The violation by the owners of the Westminster Chambers in Boston of the provisions of St. 1898, c. 452, § 1, by erecting "sculptured ornaments" approved by the park commissioners extending above the height of ninety feet allowed by that statute, they having been found to have acted in good faith on the advice of counsel in trying to make the best use possible of their unfinished building after the enactment of the statute, does not deprive them of the right to compensation under §§ 3, 4, of the statute.

In St. 1898, c. 452, limiting the height of buildings on and near Copley Square in Boston, § 4 gives compensation for damage or loss to real estate, and § 3 gives to the owner of or any person having an interest in a building on the land described in that statute in process of construction before a certain day compensation for any damage suffered from the operation of the act other than damage or loss to real estate, the amount recoverable under one of these sections being exclusive of anything that can be recovered under the other. Thus extra foundations and extra iron for a building one hundred and twenty feet high not needed for a building ninety feet high, if they were incorporated in the building before the enactment of the statute, are an element of damage under § 4 in determining the difference in the value of the building as it was before the act and after it, and the loss on these materials which have become part of the real estate cannot be recovered under § 3.

THE following statement of the case is taken from the opinion of the court:

This is a petition for compensation for damages to an unfinished building now known as the Westminster Chambers caused

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by the enactment of St. 1898, c. 452, limiting the height of buildings in Copley Square, Boston. In case of the building in question, the limit was ninety feet.

One petition, and but one, was brought to recover compensation under § 3 and § 4 of that act. The petitioners were Henry Bigelow Williams and Babson S. Ladd, Trustees of the Westminster Chambers Trust; the Westminster Construction Company, a State of Maine corporation; the Fawcett Ventilated Fireproof Building Company, Limited, a Pennsylvania corporation; and Isaac F. Woodbury and George E. Leighton, copartners doing business under the firm name of Woodbury and Leighton.

Williams and Ladd, trustees, were the owners of the building, the Westminster Construction Company was the general contractor for the whole building, and the Fawcett Company and Woodbury and Leighton were the sub-contractors who between them were to do all the work contracted for by the construction company.

By the contract between the trustees and the construction company, made on September 1, 1897, the construction company was to erect on the corner of St. James Avenue and Trinity Place a ten story apartment house, one hundred and twenty feet in height, to be known as the Westminster Chambers. Before any work had been done upon the building it was decided to make the building a hotel in place of an apartment house.

On May 23, 1898, the date of the enactment of St. 1898, c. 452, the piles for the new building had been driven, the foundation walls were in (forming a basement nine feet in height, part below and part above the ground), and the exterior walls had been carried up some thirty-six to forty feet, being the exterior walls of the basement (above the ground) and of the first three stories. The iron frame was up five or six stories, and above that there were one or two of the uprights seventy to ninety feet from the ground. Four floors had been laid roughly, with concrete and fireproofing.

It was agreed before the petition was brought that the respondent would make no objection on account of misjoinder or nonjoinder of parties and that all parties could join in one petition. It was agreed subsequently between the petitioners, no objection being made by the respondent, that all damages due under § 4 should be awarded to the trustees, and those under

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§ 3 to Woodbury and Leighton, and "that the auditor in computing these damages should deduct from the damage awarded under the first section any duplication of items arising from the award of damages under the third section of the act."

The case was sent to an auditor, who found for the trustees in the sum of $258,710.05, with interest from May 23, 1898, and for Woodbury and Leighton in the sum of $49,989.95, with interest from the same date. This $49,989.95 was made up as follows:

1. Architect's additional services,		$3,000.00
2. Changing balconies,		3,604.00
3. Iron thirty feet at top of building not used,	$10,743.00	
Less old iron,	179.05	
		10,563.95
4. Fireproof material not used,	$7,384.00	
Less returned,	4,270.00	
		3,114.00
5. Ornamental terra cotta not used,		14,018.00
6. Carting terra cotta away,		300.00
7. Loss of front brick,		240.00
8. Cost of plans and specifications not used in the new design,		4,000.00
9. Extra foundation not needed for a ninety foot building,		2,243.00
10. Extra iron in superstructure not needed for a ninety foot building,		2,907.00
11. Allowance for two months' time to make necessary changes,		6,000.00
		$49,989.95

The auditor further found that items 1, 2, 7, 8, 9 and 10, amounting to $15,994, were duplicated, and accordingly deducted these sums from the $258,710.05, awarded to the trustees, making the amount finally awarded to them $242,716.05.

The case came on for trial in the Superior Court. The jury found that the damages due to the trustees, including interest, was $410,843.12, and that those due Woodbury and Leighton

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were $71,127.36, including interest. As a condition in denying a motion made by the respondent for a new trial, the judge directed the trustees to remit all due to the trustees in excess of $284,600, which the petitioners have done.

It appeared from the testimony at the trial and from the auditor's report that since the enactment of St. 1898, c. 452, the hotel had been completed as an eight story hotel, the eighth story being seriously reduced in height and rendered less valuable by the necessity of carrying pipes under its ceiling, and other changes.

It also appeared that after the passage of St. 1898, c. 452, the park commissioners had granted a license to erect sculptured ornaments on the building, which made it a ninety-six foot in place of a ninety foot building. This was finally removed, we assume in compliance with the decrees in *Attorney General* v. *Williams*, 174 Mass. 476; *S. C.* 178 Mass. 330, affirmed on appeal, *sub nomine Williams* v. *Parker*, 188 U. S. 491.

Mr. Leighton testified in behalf of the petitioners "that the work which had been done in the erection of a wall above the height of ninety feet, as complained of in the bill of complaint brought by the City of Boston, July 25, 1898, and which had been removed in consequence of a decree of the Supreme Court, was necessary to the support of the frieze and sculptured ornaments which had been approved by the park commissioners, and that the frieze could not have been supported without said wall unless another story of the building had been sacrificed, and that the work had been done in good faith and under legal advice, that it was authorized by the action of the park commissioners."

At the trial the petitioners were allowed under the exception of the respondent to prove by experts that the fair rental value of the hotel originally contemplated would have been $50,000 a year, and that of the hotel as finished was $30,000; that the amount actually expended on the hotel as it is (excluding the cost of putting up and taking down the sculptured ornaments) was $689,000, making together with the value of the land, a total cost of $1,054,000; also that the value of the hotel as originally contemplated would have been $1,000,000, including the land at $365,000 and the fair value of the hotel as it was,

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$600,000; and finally that the cost of the hotel as originally planned would have been $573,000 as against $689,000 for the hotel as it is. The petitioners were also allowed under the respondent's exception to show the actual cost of finishing the present hotel in addition to the sums expended before the enactment of St. 1898, c. 452.

The petitioners produced evidence that $215,000 had been expended on the hotel at the date of the enactment of St. 1898, c. 452, and in addition that about $135,000 represented the architects' and promoters' fees, taxes, interest and other carrying charges. The respondent's experts gave it as their opinion that the fair cost of the building as it existed on the ground at that time was $114,000 to $136,700. The testimony of these witnesses was to the effect that the damage to the land and building was much less than the amounts found by the auditor or the revised verdict, "said witnesses giving as their opinion that all the damages coming to the incomplete building by reason of the act were covered by items in the third section of the act."

There was evidence that after the passage of the act the method adopted by the petitioners for completing the building as it now stands was a reasonable and proper method for securing the most value from the premises, and that the cost of the work and materials in building was reasonable.

The respondent contended that buildings on the lot in question were restricted to seventy feet by Sts. 1896, c. 313, and 1897, c. 379, on the ground that the land bounded by Huntington Avenue, St. James Avenue and Trinity Place was a public park. It was not contended that a building line on St. James Avenue or Copley Square had been established under Sts. 1896 and 1897 before May 23, 1898.

At the conclusion of the evidence the respondent asked for the following rulings:

"1. By the provisions of section 1 of chapter 313 of the acts of 1896, which act was accepted by the city council of Boston May 14, 1897, the height of buildings upon a street which bordered on a park was limited to seventy feet. The grass plot on St. James Avenue forming part of Copley Square had been acquired by the park commissioners as a public park and was a

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public park within the meaning of said act, and St. James Avenue was a street or way bordering upon said park. As the petitioners could not build upon their land to a height of more than seventy feet before the passage of the act of 1898, and could build to a height of ninety feet afterwards they received no damage under this act.

"2. It appearing by the uncontradicted testimony in this case that the petitioners, instead of complying with the provisions of the act, built their building above the height of ninety feet, they cannot recover damages under an act which they did not obey. The petitioners cannot claim the benefits which would have accrued to them under the act if they had obeyed it when they have disobeyed it. You will therefore find a verdict for the defendant.

"3. Section 3 of chapter 452 of the acts of 1898 provides in its terms for all damages sustained by the owners of this particular building as far as the building itself is concerned, and gave them a petition to be brought within two years from the passage of this act. While the damages to all other property limited in height by this act are to be assessed in the ordinary manner in which other real estate damage is to be assessed when highways are laid out this particular property is divided into two parts, the land and the incomplete building, and the damage to the building is to be recovered as a specific and independent item and then added to the depreciation, if any, in the value of the land. Any other interpretation of the act would give the owner of this land double damages for any depreciation in value which came to his incomplete building."

In his charge to the jury the presiding judge told them that the question under § 4 of the act was: What was the injury to the market value of the land of the petitioners with the unfinished building upon it caused by the limitation upon the height of buildings created by St. 1898, c. 452; that "in so far as the materials had been collected together and affixed to the soil, their character as personal property was changed; they became real estate. In so far as the building which was designed and planned and in course of construction remained to be completed, rested simply in contract between the owners and the other contracting parties, it was not real estate, it was in the nature of a

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business carried on upon that property, and injury to it so far as it remained unexecuted is not a subject for the assessment of damages under § 4 of this act"; and coming to the question of the unfinished building, the jury might take the land and the building separately in arriving at the value of the real estate on May 23, 1898, or they could arrive at that value without separating them, as they chose; that the unfinished building being a part of a hotel building planned to be ten stories high and extending one hundred and twenty feet above the soil, "for the purpose of assisting the jury to come to a conclusion as to what the market value of it was, evidence has been introduced as to what the value of the whole building with the land together would have been if the building had been completed according to the original plan and design. That evidence as to the value of the completed building, if it had been completed according to the original design is to be used . . . as an aid to the jury, so far as the jury find that it is an aid to them, in coming to a conclusion as to the market value of the land and unfinished building on May 23, at the time of the passage of this act — either the land and the unfinished building together as a whole, or the value of the unfinished building as a part of the whole. In like manner, evidence as to the cost of the construction of that building up to the point it had reached in the course of construction on the 23d of May, 1898, has been admitted. That evidence also is admitted as an aid to the jury in coming to a conclusion as to the market value of the property in question, the land and the unfinished building upon it, at the time of the passage of the act." Later, he told them that "In determining that question you are to apply similar rules to those which I have stated in determining the value of the property before the act. What occurred after the passage of the act in the intervening time between May 23, 1898, and the present time, so far as it has appeared in evidence before you by the testimony of witnesses, and so far as you have acquired the knowledge of the events which occurred in that intervening time by your view of the property — those facts are to be used merely as an aid to assist you in determining what the property was worth immediately after the passage of this act. At that time the building stood there unfinished, although it was in the course of erection; but

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it was in fact an unfinished structure. It is a question for the jury to consider what was the reasonable and most advantageous use that could be made of it after the passage of this act — that is, made of the property, the land and the building in its unfinished state, taken together. Applying the principles which I have already stated, you are to determine what that value was, and the difference between the value of the unfinished structure and the land together, after the passage of the act, and the value of the land and the unfinished structure before the passage of the act, is the amount of compensation to which the owners are entitled under § 4 of this act.

"In regard to the completion of the building, the jury have heard evidence as to what the cost of completing it was, and have also heard evidence as to what the value of the building is as completed, and after being completed in accordance with the provisions of the act, that is, within the limitation fixed by law. That evidence was admitted and may be considered just like the evidence of the value of the original structure as it was designed, if it had been completed, for the purpose of aiding you to determine the value at the time of the passage of the act, May 23, 1898. In coming to a conclusion as to how much the market value of the property was after the passage of the act, you may consider the testimony in the case relating to the value of the finished building, that is, finished in accordance with the provisions of the law, and also evidence of the cost that was incurred in completing the building under the height of ninety feet, within the provisions of the law. If you find that the building was put forward in a reasonable manner, reasonably constructed and at reasonable cost, and that the owners acted prudently in completing the construction of the building under the provisions of the law, then you may consider that cost incurred in coming to a conclusion as to what the value of the land and unfinished building was after the passage of the act. In like manner, you may consider for the same purpose the value of the finished building."

In explaining § 3 of the act, the presiding judge instructed the jury as follows:

"I wish, however, to make clear to you that under the construction which I have given to you as the true construction of

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this special statute, there is no conflict between the provisions of § 4 and the provisions of § 3. For example: Under the provisions of § 3 it is conceded by all parties in this case that the following items are proper elements of damage, to wit:

Item 9: Extra foundation not needed for a 90 foot building $2,243

Item 10: Extra iron in superstructure not needed for a 90 foot building $2,907

"As the court understands the evidence, so far as the foundations were concerned, the foundations had been actually put in. They were put in as foundations for a ten story building to be one hundred and twenty feet in height. They were heavier, stronger, in some respects probably, at any rate different from what they would have been if they were designed and intended from the beginning for a building to be only ninety feet in height. The consequence is, the owners being, after the passage of this act, no longer permitted to construct a building to a height of one hundred and twenty feet, they have put in the form of foundations material which serves no useful purpose as foundations for a ninety foot building. It is an example of what might be called wasted material, and if wasted in consequence of the passage of the act, all parties concede it is a proper element for compensation under § 3 of the act.

"Similar observations apply to item 10 which I read, 'Extra iron in superstructure not needed for a ninety foot building.' The evidence shows without contradiction that there was a considerable part of the iron for the superstructure of a ten story building actually put in place. So far as that iron was heavier, more expensive or different for a ten story building than it needed to be for a ninety foot building, it is an element for compensation under § 3 of this act. But what about it under § 4 of the act? As I have instructed you, under § 4 your inquiry is, What was the injury to the market value of the property? If purchasers wished to buy that property and found that there was in it material that was not needed, whether in the form of unnecessary iron or unnecessary granite, after the passage of this act, they would not pay as much for it. That would affect the market value and would be thrown out by purchasers in considering

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what would be a fair price to pay. So that under § 4 of the act those items would have no effect whatever upon the value, and you do not have to consider them in determining the market value of the property before and after the passage of the act, for the purpose of assessing the injury to the value under § 4. That section deals with diminished value, what price a purchaser desiring to buy would be willing to give; what price an owner desiring to sell would be willing to receive in the exercise of good sound judgment upon the facts in the case. . . .

"The sum which you find under § 3 as the amount of damage proved under that section, with interest added, will represent the amount to which the petitioners are entitled under that section. It will not be necessary for you to make any deductions from that sum by reason of any duplication of items in that sum which were previously included in the assessment under § 4. The two sections provide for entirely different elements of damage; and if you apply, in assessing damages under § 4, the principles which I have stated, directing your attention to injury to market value, there will be no duplication of items. The work under each section can be performed entirely separately."

On the conclusion of the charge the respondent excepted to the refusal to rule as requested, and "to those portions of the charge which are contradictory to the said requests, and to the portion of the charge in which the judge ruled in substance that it would not be necessary to make reductions from the diminution in the market value of the land and building assessed under § 4 on account of duplication of damages to the incomplete building under these two sections."

By an amendment to the bill of exceptions, it is further stated that:

"The petitioners made no claim for damages under § 3 except for the items stated in Woodbury and Leighton's bill, and the only items in this bill disputed by the respondent were numbers 1, 5, 8 and 11.

"In regard to number 5 the respondent's claim was that $10,000 of this amount was for terra cotta used in the erection of the wall above 90 feet, the petitioners claiming that this terra cotta had been specially designed and made for this building and that thus it was useless for any other purpose.

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"The finding of the jury under § 3 was for the amount of Woodbury and Leighton's bill with interest.

"No request was made by the respondent for rulings in reference to duplication except so far as it may be covered by the requests herein stated, and the attention of the court was not called to its instructions in that respect except by the requests herein stated and by the statement of the respondent's counsel (which statement he repeated), made after the charge was given and assented to by the court that he excepted, in connection with his exceptions to the refusal of the court to give the third request, to wit, that § 3 was intended to cover all the damages which would come to the incomplete building, to that portion of the charge where the court said in substance: 'It will not be necessary to make deductions on account of the duplication of the damages to the incomplete building under §§ 3 and 4 of the act.' There was no evidence of duplication of any of the items in Woodbury and Leighton's bill unless the same may be found in this bill of exceptions, the respondent's claim being that as a matter of law certain items in § 3 are damages to the market value of the incomplete building."

R. M. Morse, (*W. P. Everts* with him,) for the petitioners.

T. M. Babson, for the respondent.

LORING, J. [After the foregoing statement of the case.] 1. We are of opinion that the testimony of the value of the building as planned and finished, the rental value of the two and the cost of completing the building (the latter taken in connection with the testimony that completing the building was the best thing to be done, and that the cost so incurred was reasonable) were all admissible in the discretion of the presiding judge for the purposes explained in the charge, upon the issue under § 4, to wit, what was the value of the land and unfinished building before the enactment of the act, and what was its value after. We see nothing in the cases cited by the respondent to the contrary. *Chase* v. *Worcester*, 108 Mass. 60. *Pinkham* v. *Chelmsford*, 109 Mass. 225. *Cobb* v. *Boston*, 109 Mass. 438. *Fairbanks* v. *Fitchburg*, 110 Mass. 224. *Boles* v. *Boston*, 136 Mass. 398. *Cushing* v. *Boston*, 144 Mass. 317. *Maynard* v. *Northampton*, 157 Mass. 218.

2. The first ruling requested was rightly refused. The re-

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strictions in Sts. 1896, c. 313, and 1897, c. 379, apply only to parkways on which a building line has been established as therein provided.

3. It is now established that in erecting the sculptured ornaments the trustees acted in violation of St. 1898, c. 452. But the jury were warranted in finding that they did so on the advice of counsel, and acted in good faith in trying to make the best use that could be made of the unfinished building. Under those circumstances, at any rate, they did not lose their right to compensation under this act.

4. The third ruling was also rightly refused. In our opinion all damages to the real estate are recoverable under § 4, and all other damages are recoverable under § 3. Section 3 was in our opinion inserted to give to the owners of the real estate compensation for damages which they could not recover as owners of the real estate, and to give compensation for damages suffered by them to other persons having an interest in any building covered by the act (a contractor for example) who but for § 3 would have no claim to compensation. Rightly applied, there would be no duplication of compensation.

5. But we are of opinion that the two sections were not rightly applied. In our opinion not only is there a possibility that there may have been compensation awarded twice for the same damages, but of necessity there was such a duplication. The judge told the jury that items 9 and 10, being items for extra foundations and extra iron put in for a one hundred and twenty foot building and not needed for a ninety foot building, were proper elements of damage under § 3. If these had been bought and paid for by the owners before the enactment of St. 1898, c. 452, but had not been incorporated into the building, they would have been proper items to be recovered under § 3. Under the circumstances just put, had no such provision been in the act as those contained in § 3, no compensation for these items could have been obtained. Section 4, limiting the compensation due to damage or loss in his property, is restricted to damage or loss to his real estate. For other damage or loss he is remediless under that section. See in that connection, *New York, New Haven, & Hartford Railroad* v. *Blacker*, 178 Mass. 386, and cases cited; *Sawyer* v. *Commonwealth*, 182 Mass. 245, 247;

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Bailey v. *Boston & Providence Railroad*, 182 Mass. 537, 539; *Boston Belting Co.* v. *Boston*, 183 Mass. 254; *Nashua River Paper Co.* v. *Commonwealth*, 184 Mass. 279. The object of § 3 was to enable the owner to recover damages of that character to which he otherwise would not be entitled. It was also evidently intended to allow third persons having an interest in the building who had suffered loss in the limitation of the height of the building to recover for such loss.

In the case at bar the right to compensation under the two sections would have been plainer if the parties had brought and proved the proper petitions by the several parties, in place of bringing one petition in which all joined, and agreeing that all compensation due under § 3 should be paid to Woodbury and Leighton, whether due to them or to any one of the other petitioners.

As we have said, money expended for items 9 and 10, if not incorporated into the building, would have been proper items for compensation under § 3. But when they were incorporated in the building they necessarily entered into the difference between the value of the building as it was before the act and its value as it was after the height to which it could be built had been limited by the act to ninety feet. It would be hard to state this more clearly than it was stated in the charge of the presiding judge when he said, in speaking of these very items 9 and 10: "If purchasers wished to buy that property and found that there was in it material that was not needed, whether in the form of unnecessary iron or unnecessary granite, after the passage of this act, they would not pay as much for it. That would affect the market value and would be thrown out by purchasers in considering what would be a fair price to pay." If the unnecessary iron and foundations which added to the value before the act as part of a hotel one hundred and twenty feet high would be thrown out by a purchaser in fixing a price for the unfinished building after it was limited by the act to ninety feet, the loss represented by these two items is included in the decrease in the market value of the unfinished building. And the jury should have been instructed accordingly. The auditor was right in holding that the amount of these two items was duplicated, and seems also to have been right in holding that the other items

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deducted by him (to wit, items 1, 2, 7 and 8) were duplicated. Whether he was right as to items 1, 2, 7 and 8 it is not necessary now to decide finally. The facts stated in the record as to these items are not altogether plain.

But the auditor was not right in deducting these items, nor were the parties right in agreeing that any items should be deducted. As we have said, compensation cannot be recovered for the same items under both sections. Compensation for items 9 and 10 being recoverable under § 4, cannot be recovered under § 3, and the same is true of any of the other items compensation for which can be recovered under § 4. If compensation for an item can be recovered under § 4, that item does not come within § 3. In no event can there be double compensation for the same item; and in no case can there be any deduction for duplication if the two sections are properly applied.

Exceptions sustained.

ANDREW MORTON *vs.* BRACKLEY SHAW & another.

Suffolk. January 8, 1906. — March 1, 1906.

Present: KNOWLTON, C. J., MORTON, LATHROP, HAMMOND, & SHELDON, JJ.

Surety. Bond. Practice, Civil, Amendment.

Under R. L. c. 173, §§ 48, 121, a surety on a bond to dissolve an attachment is not discharged from liability by an amendment to the declaration in the action against his principal in which the attachment was made, although the amendment was allowed without notice to him, if its only effect was to put into proper form the statement of the cause of action for which the action was intended to be brought.

An amendment to a declaration on a memorandum as a contract in writing changing it into a declaration on an oral contract of which the writing is a memorandum does not so change the original cause of action as to discharge the sureties upon the defendant's bond to dissolve an attachment.

CONTRACT against Brackley Shaw and Walter S. Keene, the sureties on a bond to dissolve an attachment given in the case of *Morton* v. *Clark*, reported in 181 Mass. 134 and 184 Mass. 555. Writ in the Supreme Judicial Court dated March 9, 1904.

The defendant Keene suggested to the court his discharge in

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bankruptcy and moved that the action be discontinued as against him. By agreement of the plaintiff this motion was allowed by *Hammond*, J.

The case was presented to the full court under R. L. c. 156, § 6, upon a case stated, the substance of which appears in the opinion.

R. M. Morse, (*W. P. Everts* with him,) for the plaintiff.

E. G. Loomis, (*T. J. Kenny* with him,) for the defendant Shaw.

KNOWLTON, C. J. This is an action on a bond to dissolve an attachment. The condition of the bond is that "the defendants shall pay to the plaintiff in said action the amount, if any, which he shall recover therein," etc. Judgment has been recovered, and the sureties set up, as their only defence, that they have been discharged from liability by an amendment of the declaration in the original action.

The law applicable to their contention has been fully considered and settled in recent cases. *Driscoll* v. *Holt*, 170 Mass. 262. *Doran* v. *Cohen*, 147 Mass. 342. *Townsend National Bank* v. *Jones*, 151 Mass. 454. *Norris* v. *Anderson*, 181 Mass. 308. *Diettrich* v. *Wolffsohn*, 136 Mass. 335. In the first of these cases the discussion is so full, and covers this case so clearly, that it seems superfluous to add anything. The statute is R. L. c. 173, § 121. As the amendments were allowed without notice to sureties, it is open to them to contest the effect of the amendments. But if their effect was merely to put in proper form the statement of the cause of action upon which the action was brought, they are binding upon the sureties, even though they greatly change the form of statement of the claim, or greatly enlarge the amount claimed according to the language of the original declaration.

In the present case the recovery was on the second amended count. That differs from the original declaration in two particulars. The original states the claim as founded upon a written contract for the sale of goods. In the opinion (*Morton* v. *Clark*, 181 Mass. 134) the court said: "The plaintiff declared on the memorandum as a contract in writing, and not on an oral contract of which the writing is a memorandum. . . . If the declaration had been upon an oral contract . . . and had treated the writing as a mere memorandum not intended as a formal

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contract, . . . different questions would have arisen which we need not now consider," etc. The amendment to the declaration corrected this error in the pleading.

There was another error in the declaration which was entirely clerical. The contract was for the sale of four thousand sides of leather, and the declaration averred that the defendant delivered 28,538 sides of leather, and neglected and refused to deliver the remaining 11,462 sides of leather. The fact was that 11,462 sides had been delivered, and the defendants had neglected and refused to deliver the remaining 28,538 sides. This mistake of statement was corrected in the amended declaration.

Such changes as these do not introduce a new cause of action. They merely put the pleadings in form properly to present to the court the original cause of action for which the action was brought.

The substance of the decision in *Prince* v. *Clark*, 127 Mass. 599, is that the amendment changed the cause of action, so as to enable the plaintiff to recover for that which he did not intend to include when he brought his action, but introduced later, through the amendment, in order to relieve himself of the consequences of a mistake in another case, made after his writ was entered. Although the amendment was binding on the defendants in the action in which it was made, it ought not to have been allowed. This decision does not affect the law as stated in the other cases above cited.

Judgment for the plaintiff.

S. AUGUSTUS ALLEN, administrator, *vs.* EMBURY P. CLARK.

Hampden. September 26, 1905. — March 2, 1906.

Present: KNOWLTON, C. J., MORTON, LATHROP, HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Husband and Wife. Attachment. Statute, Construction.

If a married woman carries on a farm purchased with her own money, her husband living with her on the farm and acting as her agent, but no certificate for her to do business as a married woman is filed under the provisions of R. L. c. 153,

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§ 10, the personal property of the wife which was employed in the business of carrying on the farm during her lifetime cannot be attached after her death as the property of her husband.

A statute which provides a civil liability for a failure to comply with its requirements partakes of the nature of a penal statute and should be construed strictly.

TORT by the administrator of the estate of Losetta O. Hunt, late of Westfield, against the sheriff of the county of Hampden for the alleged conversion by one King, a deputy of the defendant, of certain personal property belonging to the estate of the intestate. Writ dated May 15, 1903.

At the trial in the Superior Court before *DeCourcy*, J. it appeared that the plaintiff's intestate died on March 16, 1903, leaving a husband and a son, and that the property in question was attached by King, on April 9, 1903, upon various writs against Alfred S. Hunt, the husband; that the intestate on May 9, 1901, had purchased the farm with her own money and that she and her husband had lived on it since that time up to the time of her death; that the personal property attached belonged to the intestate and during her lifetime had been employed in carrying on the farm, the business being done mostly in the name of the husband; and that no certificate for the intestate to do business as a married woman ever was recorded under R. L. c. 153, § 10. The plaintiff introduced evidence tending to show that the management, control and carrying on of the farm were solely in the charge of the intestate, and that such acts as her husband did about the carrying on of the farm were solely as her agent.

The judge ruled that this personal property of the plaintiff's intestate was not liable to be attached after her death as the property of her husband or to be taken on execution against him in the actions brought after his wife's death. He found for the plaintiff in the sum of $699, and reported the case for determination by this court.

If the ruling was correct, judgment was to be entered on the finding. If the husband's creditors had a legal right to attach the personal property of the wife after her decease and sell it on executions against him, the finding was to be set aside, and judgment was to be entered for the defendant.

The case was argued at the bar in September, 1905, before

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Knowlton, C. J., *Lathrop*, *Hammond*, *Loring*, & *Braley*, JJ., and afterwards was submitted on briefs to all the justices.

A. S. Kneil, for the plaintiff.

F. A. Ballou, for the defendant.

HAMMOND, J. This is an action of tort in the nature of trover, tried in the Superior Court without a jury and sent here by report. It appears that one Losetta O. Hunt, a married woman, at the time of her death was, and for some time before had been, engaged in carrying on the business of farming upon her own land with personal property belonging to her, but without having recorded a married woman's certificate in accordance with the provisions of R. L. c. 153, § 10. She died on March 16, 1903, and on April 7, 1903, the plaintiff was appointed administrator of her estate. On April 9, 1903, one of the defendant's deputies attached the personal property on a writ brought against the husband to collect a debt owed by him.

The case raises the question whether the personal property could be reached by the husband's creditors under R. L. c. 153, § 10. This section provides that, where a married woman is doing business on her own account, a certain certificate shall be caused to be recorded by her or by her husband, and further that if such a certificate is not so recorded by either husband or wife, "the personal property employed in such business shall be liable to be attached as the property of the husband and to be taken on execution against him, and the husband shall be liable upon all contracts lawfully made in the prosecution of such business in the same manner and to the same extent as if such contracts had been made by himself."

The contention of the defendant is in substance that the personal property of a married woman once employed by her in the uncertificated business is liable for the husband's debts so long as it is owned by her, irrespective of the question whether at the time of the seizure by the husband's creditors it be then thus employed, or, in a word, that having once employed the property in her uncertificated business she is forever thereafterwards estopped from setting up her title as against her husband's creditors; and that in this respect the administrator of her estate stands in no better position than she does.

The kind of legislation of which this section is the outcome

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was begun by St. 1862, c. 198. The common law rights of a married woman as to her own separate property and her power to contract, had been considerably modified. At the time of the passage of this statute a married woman might carry on business on her own separate account, and her separate property was not liable for the debts of her husband. Under this state of the law it sometimes, perhaps frequently, happened that a business was being carried on apparently by the husband and yet, when his creditor (whether the debt was contracted by the husband in his apparent business or otherwise) undertook to collect the debt by an attachment of the property used in the business, he was confronted with the claim on the part of the wife that the business was really carried on by her and not by her husband; and, inasmuch as her separate property could not be taken for his debts, the attachment would not stand. Doubtless in many cases this claim of the wife was fraudulent, but the relation between husband and wife is such that detection of the fraud was difficult.

Under these circumstances St. 1862, c. 198, was passed. Its purpose was to prevent this kind of fraud, or at least to render it ineffective. It provided that a certificate might be filed by the wife, and that in case no such certificate should be filed by her she should "not be allowed to claim any property employed in said business as against any creditors of her husband, but the same may be attached on mesne process by any such creditor, or taken upon execution, against the husband of said woman." If now we look simply to the state of the law and the evil to be cured, the most natural and easy reading of the statute would seem to be that the time when the wife shall not be allowed to claim the property is the time when it is taken either by attachment or execution, and that as a necessary implication, the time it is employed in the wife's business must be the same time. Or, in other words, the wife shall not be allowed to claim the property if at the time it is seized by the husband's creditors it be employed in the business.

And this interpretation grows more natural the more the nature and purpose of the statute is considered. In the first place, the statute is in derogation of the theretofore existing rights of the parties in a very important particular. It makes the property of one person liable for the debts of another. While a

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statute making so important a change should have a reasonable construction, it is to be borne in mind that this statute, while not penal in the strict technical sense of the word, still, providing as it does a civil liability for failure to comply with its requirements, is penal in its nature, and should be construed with corresponding strictness. In the next place, no lien is expressly created by the statute. This is one of its leading features. If the Legislature had intended to create a lien upon the wife's property in favor of the husband's creditors, which should last so long as the property was owned by the wife, or until attached by her creditors, or for any other time, it easily could have done so by clear language.

Moreover, the results likely to follow from the interpretation for which the defendant contends are such that it cannot be supposed they were intended unless such intent be clearly expressed. One or two illustrations will serve to indicate their nature. A wife carries on the livery business, in which she employs ten horses which she lets to customers. She desires to take one of them out of the business and to devote it exclusively to the use of herself or her daughter as a saddle horse. Acting in good faith she does this. One year afterward, the horse, while being so used, is attached for the husband's debt. Can any one think that the statute intended such a result? Again, suppose the wife is carrying on a grocery and takes a barrel of flour home for the use of the family, or that she is engaged in the sale of jewelry and in good faith takes from her stock a diamond ring, intending no longer to employ it in the business but to use it exclusively for her own personal ornament, is it the intention of the statute that the flour or the ring shall be liable for the husband's debts? Upon the defendant's interpretation the property of a married woman who has ever carried on business without recording the required certificate is divided into two parts, first, that which at some time has been employed in that business, and second, that which has not been so employed; and during the rest of her life (and even after her death so long as it remains in the hands of her executor or administrator), the property of the first kind, although long ago drawn from the business, and although the business long ago ceased, is to be held answerable for the debts of the husband; and that is so even if the debt

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be contracted by the husband long after the cessation of the business.

Nor can the fact that the liability of the husband under the second section of the statute continues after the business has ceased, have any bearing. Even upon the defendant's theory, the liability of the wife's property for his debts is not coextensive in time with that of the husband for the debts of the business. Upon an analysis of the statute these things appear: First, that if the wife files a certificate, her property is not liable for the husband's debts: Second, if she does not file a certificate, the property used in the business is liable for his debts, and that is so whether or not the debt have any relation to the business: Third, in the absence of a certificate by the wife, the husband may file a certificate, in which case, although the property of the wife used in the business is still liable for his debts, he is not liable for the debts of the business: Fourth, if neither files a certificate then he is liable.

It thus appears that the liability on the part of the wife is not personal, while that of the husband is; that the liability of the wife's property is for any debt of the husband whether or not contracted in carrying on the business, while the liability of the husband is only for the business debts; that the liability on the part of the wife's property, even upon the defendant's theory, ceases when the title to the property passes from her, while the liability of the husband continues during his life and remains against his estate in the hands of his personal representatives as his own debt; and lastly, the liability of the wife under the first section may exist although the husband by filing a certificate may escape liability (at least for debts thereafter contracted in the business) under the second section. Neither in nature nor duration are those liabilities identical or even similar, and under certain circumstances one may exist without the other. It is manifest that the nature or duration of one can furnish no analogy as to the nature and duration of the other.

If it be said that the general intent of the Legislature was that this kind of the wife's property should be held to pay the husband's debts, and that the interpretation for which the defendant contends carries out that intention, the answer is that such an assumption of the legislative intent is simply a begging of the

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question. The question before us is, What was the intention of the Legislature?

It seems plain that the statute was dealing with a state of things existing at the time the husband's creditors laid hold of the property. If at that time the wife had filed no certificate and the property seized was employed in the business, then the creditor could hold it, otherwise not. So far the Legislature intended to go, and, for reasons hereinbefore stated, it seems plain that it intended to go no farther. Such an interpretation of the statute is suggested by the obvious, syntactical connection of the words, by its penal nature, and by a view of the evil it was intended to reach. Moreover, it gives a plain, easily understood rule for its administration, and avoids the results and practical difficulties liable to occur under the interpretation contended for by the defendant.

Notwithstanding some changes in phraseology, we think that, so far as it is material to the question before us, R. L. c. 153, does not differ in legal meaning from St. 1862, c. 198. See St. 1881, c. 64; Pub. Sts. c. 147; St. 1898, c. 416.

In the case before us the business of the wife was terminated by her death. There is no evidence that the administrator was carrying on the business for her estate, and the presumption is that he was not. In the opinion of a majority of the court, the ruling of the trial court that under these circumstances the personal property of the plaintiff's intestate was not liable to be attached after her death as the property of the husband and to be taken on execution against him in actions brought after death, was correct.

Judgment on the verdict.

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ANNA G. WEEKS, administratrix, *vs.* BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. November 13, 14, 1905. — March 2, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Evidence, Expressions of pain, Declarations of deceased persons. *Negligence. Street Railway.*

In an action by an administrator for personal injuries incurred by the plaintiff's intestate, evidence that after the injuries the plaintiff's intestate looked sick and complained of pain, that during a drive in her own carriage she said that "it seemed as though it never rode so hard before," that she complained of her head aching, that she frequently would put one hand on her chest and one on her back and speak of distress, that she made gestures about her head and spoke of her head as paining her severely, is admissible as showing exclamations and expressions manifesting the existence of present pain.

Under St. 1898, c. 535, now R. L. c. 175, § 66, after one witness has testified to certain declarations of a deceased person admissible by the terms of that act, other witnesses may testify to similar statements of the declarant made to them.

In an action by a woman against a street railway company for injuries from being thrown down by the sudden starting of a closed electric car with a violent and unusual jerk while the plaintiff who had entered the car as a passenger had proceeded up the passageway of the car five or six feet without taking a seat, the jury may find that the plaintiff was exercising ordinary care in proceeding toward the front of the car even if she passed an empty seat which she could have taken.

It is no evidence of negligence on the part of the conductor of a closed electric car that while a woman passenger of ordinary strength and health who had entered the car was proceeding on her way to a seat he gave the signal for starting the car without waiting for her to be seated and without notifying her that he was about to give the signal.

TORT by Elizabeth J. Glidden for personal injuries received on August 19, 1898, while a passenger in a car of the defendant by reason of the alleged negligence of the defendant's servants. Writ dated November 28, 1898.

On July 6, 1899, the original plaintiff died, and the present plaintiff, the administratrix of her estate, was admitted as plaintiff to prosecute the action.

At the trial in the Superior Court before *Wait*, J. one Mrs. McLaughlin, a sister of the plaintiff's intestate who was with her at the time of the accident, testified to the happening of the accident as described in the opinion.

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The evidence referred to in the first paragraph of the opinion was as follows:

"She complained a great deal." "She looked sick and complained of pain." During a drive of three miles from the house of the physician to her own house in her own carriage "She spoke how hard it rode; it seemed as though her carriage never rode so hard before." "She complained of her head aching and pain in the back of her head." "She would frequently place her hand, one on the chest and the other one on her back, and speak of distress." She also made gestures about her head. "She spoke of her head as paining her severely."

The defendant asked for thirteen rulings, of which the judge gave three as requested, gave five in a modified form, and refused five. The five rulings refused by the judge were as follows:

"1. Upon all the evidence in the case the plaintiff is not entitled to recover.

"2. There is no evidence in the case that the injuries sustained by the plaintiff were caused by the carelessness or negligence of the conductor of the car.

"3. Under the circumstances existing at the moment when the conductor gave the signal to start the car he was warranted in giving the signal and it was not negligence or carelessness on his part so to do.

"4. There is no evidence in the case that the injuries sustained by the plaintiff were caused by the carelessness or negligence of the motorman of the car."

"10. It was the plaintiff's duty when she heard the bell given to start the car to seek to protect herself from falling by taking hold of the overhead straps or by immediately taking a seat."

The portion of the charge referred to at the end of the third paragraph of the opinion as sufficiently favorable to the defendant was as follows:

"And I instruct you upon that that it was the plaintiff's duty when she was once on board the car to take a place of safety as soon as reasonably possible. That is to say when a person gets on to an electric car the law assures that person a reasonable time to reach a place of safety. And it is for you to determine upon the facts in this case whether the deceased had had that opportunity and whether in any way she had neglected it.

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"If you, Mr. Foreman, in getting on to a car prefer a seat in one place rather than another you are at liberty to act upon that preference, but if you have had opportunity to seat yourself somewhere else and as a reasonably prudent and careful person ought to have seated yourself somewhere else you take the chances of being injured in going to the place of your preference rather than the place which you might have taken and where you would have been safe. All that the railroad is bound to do as an exact matter of law is to give you opportunity to reach a place of safety. If you neglect to take the place of safety which a reasonably prudent person would take as soon as possible then you may be assuming the risks of being hurt while you are going somewhere else, because it is a matter of importance to the public which the law recognizes that the defendant corporation in a case like this should conduct its business reasonably."

The jury returned a verdict for the plaintiff in the sum of $5,198; and the defendant alleged exceptions.

W. B. Farr, for the defendant.

E. R. Anderson, (*A. T. Smith* with him,) for the plaintiff.

HAMMOND, J. 1. The complaints of the deceased as to pain were rightly admitted. They do not appear to have been a narration of past pain, but only such exclamations or expressions as usually and naturally accompany and manifest the existence of present pain. *Bacon* v. *Charlton*, 7 Cush. 581. *Hatch* v. *Fuller*, 131 Mass. 574. *Cashin* v. *New York, New Haven, & Hartford Railroad*, 185 Mass. 543. The same consideration disposes of the exceptions to the evidence that the deceased in riding one day in her own carriage from the doctor's office to her house "spoke about how hard it rode," and said that "it seemed as though her carriage never rode so hard before." This may well be regarded as an expression and indication of then present pain or weakness.

2. After a daughter of the deceased had testified to a conversation with her mother, in which the latter described the accident, another daughter was allowed to testify to a similar conversation with her mother. To the admission of this last conversation the defendant objected upon the ground that St. 1898, c. 535, now R. L. c. 175, § 66, under which the evidence was admitted, did not contemplate that more than one state-

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ment of the deceased person should be admitted, and that to allow evidence of another similar statement would have the effect of corroboration of the first statement made by the deceased, or, in other words, would result in a duplication or multiplication as the case might be, of the deceased as a *post mortem* witness. For reasons too obvious to require a statement of them, this interpretation of the statute cannot be adopted.

3. The facts as to the circumstances of the accident are not much in dispute. The plaintiff's intestate, Mrs. Glidden, with her sister, Mrs. McLaughlin, signalled for the car to stop. It stopped, and when the former had entered the car and proceeded up the passageway five or six feet, and while the latter was still upon the platform, the car started. The evidence warranted a finding that the conductor, who was standing upon the rear platform with both women in full view, gave the signal for the car to start; that it suddenly started with a violent and unusual jerk, by which Mrs. Glidden, who was still standing, was thrown over backwards upon the floor of the car and injured. There were several passengers in the car, and it does not appear that it was necessary for the plaintiff's intestate to go so far into the car before taking a seat; but the jury may have properly found that in proceeding towards the front of the car she was exercising ordinary care even if she did pass an empty seat which she could have taken. Upon this branch of the case the instructions were sufficiently favorable to the defendant.

It is argued by the plaintiff that the conductor was negligent. In considering this question it is to be noted that we are to consider his duty, not to Mrs. McLaughlin who was still upon the step, but to the plaintiff's intestate who was well inside the car. The latter is described as a strong, healthy woman at the time, between fifty-eight and sixty years of age, showing no sign of physical or mental infirmity, and the conductor had no reason to suppose, and there was no reason to suppose, that she was other than an ordinarily careful and capable passenger. As to her we do not think that the conductor can be said to have been negligent. The woman was well inside the car, was proceeding to her seat in the usual way, and we

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do not think that the conductor was under any obligation to wait until she had become seated before giving the signal to start. Nor was he bound to notify her that he was about to give the signal. The second and third requests were therefore correct in law.

One of the grounds of complaint was that the conductor was negligent by giving too soon the signal to start, and the case went to the jury authorizing them to find for the plaintiff if they found the conductor negligent in that respect. For ought that appears the verdict for the plaintiff may have been rendered upon that ground. Under the circumstances, the failure to give the second and third requests was error prejudicial to the defendant.

Exceptions sustained.

HENRY E. BOTHFELD & another, trustees, *vs.* ALBERT L. GORDON.

Suffolk. November 17, 1905. — March 2, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Guaranty. Landlord and Tenant.

A guarantor of the performance of the covenants of a lease is not discharged from liability by an agreement between the lessor and the lessee, made without his consent, by which it is agreed that in a pending action for rent due under the lease, defended by the lessee, judgment shall be entered for the plaintiff for the amount claimed and that execution shall not issue until a day named which is earlier than the time when execution would issue in the ordinary course of judicial procedure.

It is no defence to an action on a guaranty of the performance of the covenants of a lease to recover rent due under the lease and unpaid by the lessee that, when the rent sought to be recovered was due and unpaid and an action against the lessee was pending for its collection, the lessee agreed to surrender possession of the leased property without forcing the lessor to enter and take possession as he might have done under the terms of the lease, and surrendered the property in accordance with this agreement.

CONTRACT on a guaranty in writing of the performance of the covenants of a lease of the land and buildings called

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Warner's Block at the corner of Centre Street and Elmwood Street in Newton, for $450 due as rent for the months of August, September and October, 1902, and unpaid by the lessee. Writ in the Municipal Court of the City of Boston, dated May 29, 1903.

The guaranty declared on was as follows:

"I, Albert L. Gordon for a valuable consideration, hereby covenant and agree with the lessors named in the within lease and their legal representatives, that I will guarantee the prompt payment of the rent as within stipulated, and also the faithful performance of all the covenants and agreements therein contained to be kept and performed by the said lessee.

"Witness, my hand and seal this first day of May, A. D. 1899.

"Albert L. Gordon" (seal).

The answer contained a general denial, alleged that there was no consideration for the guaranty, and further set up that the plaintiffs and Alvin J. Gordon, the lessee, made an agreement by which the lease was surrendered and cancelled, and a further agreement to extend the time of payment of the rent sought to be recovered without the consent of the defendant and that the defendant was thereby discharged from liability.

The agreement of surrender set out in the answer was as follows:

"Boston, November 1, 1902.

"Henry E. Bothfeld and Chloe M. Warner, Trustees, Successors to the within named lessors, in consideration of the assignment to them of certain underleases made by Alvin J. Gordon, the within named lessee, of parts of the premises demised in the within lease, and of other valuable considerations, do hereby release and forever discharge said Alvin J. Gordon, his heirs, executors and administrators of and from all claims, demands and causes of action of and concerning the within lease, and especially all claims by them for rent thereunder, excepting rent for August, September and October, 1902; and said Alvin J. Gordon, the lessee, does hereby surrender and yield up the said lease and the premises within described to said lessors, and such surrender is hereby accepted by said lessors, but without

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prejudice to the leases of parts of the premises assigned to said lessors as above mentioned.

"Henry E. Bothfeld and Chloe M. Warner,
"Trustees under will of John Warner,
"by Henry E. Bothfeld (seal).
A. J. Gordon" (seal).

The case came by appeal to the Superior Court where it was submitted upon an agreed statement of facts. That court ordered judgment for the defendant; and the plaintiffs appealed.

Besides the execution of the lease, the guaranty, the agreement of surrender, and the non-payment of the rent sought to be recovered, the following facts were agreed relating to the defence of the alleged agreement to extend the time of payment of the rent sought to be recovered without the consent of the defendant:

On October 1, 1902, the plaintiffs brought an action in the Newton Police Court against Alvin J. Gordon, the lessee, for rent of the premises for the months of August and September, 1902, and on November 1, 1902, the plaintiffs brought an action in the same court against Alvin J. Gordon for the rent of the premises for the month of October, 1902.

On or about November 1, 1902, the lessors and the lessee, Alvin J. Gordon, made the agreement of surrender printed above, and Alvin J. Gordon assigned to the plaintiffs certain underleases of parts of the premises, and thereupon surrendered possession of the premises to the plaintiffs.

Pending the actions and at the time of the surrender of the lease and as part of that transaction, the trustees named having no funds of the defendant in their hands, the plaintiffs and the defendant in the actions made and entered into the following agreements in writing relating to the actions, which were filed in court on December 2, 1902:

"In case No. 433:

Commonwealth of Massachusetts.

Middlesex, ss. Police Court of Newton.

Henry E. Bothfeld & *al.*, Trustees.

vs.

Alvin J. Gordon & Trustees.

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Agreement for Judgment.

"It is hereby agreed that Charles C. Prescott and Stephen J. Quinn, copartners as Prescott & Quinn, summoned as Trustees in the above case be discharged and that judgment be entered for the plaintiffs in the sum of Two Hundred and Eighty and 70.100 dollars ($280.70) with interest from the date of the writ and costs, executions not to be issued until February 15, 1903.

"A. H. Wellman,
A. W. Dana,
Attorneys for Plntffs.
"Charles R. Darling,
Attorney for Deft."

"In case No. 467.

Commonwealth of Massachusetts.

Middlesex, ss. Police Court of Newton.

"Henry E. Bothfeld *& al.*, Trustees.

vs.

Alvin J. Gordon & Trustees.

Agreement for Judgment.

"It is hereby agreed that Charles C. Prescott and Stephen J. Quinn, summoned as trustees in the above case, be discharged and that judgment be entered for the plaintiffs in the sum of One Hundred and Forty dollars ($140.) with interest from the date of the writ and costs, execution not to be issued until February 15, 1903.

"A. H. Wellman,
A. W. Dana,
Attorneys for the Plaintiffs.
"Charles R. Darling,
Attorney for the Defendant."

In pursuance of these agreements judgment was entered for the plaintiffs in each action, on December 5, 1902, in No. 433 for $283.60 damages and $9.26 costs, and in No. 467 for $140.75 damages and $9.06 costs. Execution was issued on these judgments on February 19, 1903, in accordance with the agreements above set forth.

No part of the judgments or executions was paid, and the judgments were in full force and unsatisfied at the date of the writ in this action. Albert L. Gordon, the defendant, had

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no notice of the surrender of the lease or the assignment of underleases, or of the actions for rent against Alvin J. Gordon or of the proceedings therein, or of the agreements as to judgment and execution, and did not consent to any of these contracts or transactions.

A. H. Wellman, (*A. R. Pike* with him,) for the plaintiffs.

C. R. Darling, for the defendant.

HAMMOND, J. The first ground of the defence is that by the agreements for judgment and stay of execution in the actions against the principal debtor time was given to him without the consent of this defendant. The actions were pending in the Newton Police Court, and inasmuch as the agreements were signed by an attorney in behalf of the defendant therein, it fairly may be assumed that the actions were being contested. It does not appear at what time the actions in the ordinary course of business in that court would have gone to judgment, but even if the defendant therein had been then defaulted he could have appealed to the Superior Court, and it is manifest that in the ordinary course of proceeding in the appellate court the cases could not have been reached for trial until after February 15, 1903, the time to which the stay of execution under each agreement extended; and the defendant in the case before us does not argue to the contrary.

It is to be observed that this is not a case where an agreement for a stay of execution is made concerning a judgment already in force and upon which the judgment creditor at the time of the agreement has the right to take out execution, as in *Gibson* v. *Ogden*, 100 Ind. 20, and many other cases cited by the defendant. In the case before us the plaintiffs at the time of the agreement had no judgment. The agreement for a stay of execution was a part of that under which the judgment was obtained, and there is nothing to show that the agreement for judgment could have been then obtained without the clause relating to a stay of execution. Nor is it a case where by the agreement for the stay of execution the time is extended beyond the time in which in the ordinary course of judicial proceedings it could have been obtained, as in *Wingate* v. *Wilson*, 53 Ind. 78, and several other cases cited by the defendant. The plaintiffs were prosecuting their claim by a suit against Gordon, the principal debtor, who

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had entered upon an active defence. By the agreement they obtained the right to an execution within a time shorter than that required by the ordinary course of judicial procedure. Although there is some conflict in the authorities, yet we think that upon principle and the great weight of authority such an agreement is not a giving of time within the true meaning of the phrase as contained in the general proposition that the giving of time to the principal discharges the surety. As stated in *Hulme* v. *Coles*, 2 Sim. 12: "Time was not given, but the remedy was accelerated." Among other cases supporting this view, see *Fullam* v. *Valentine*, 11 Pick. 156; *Stevenson* v. *Roche*, 9 B. & C. 707; *Price* v. *Edmunds*, 10 B. & C. 578; *Fletcher* v. *Gamble*, 3 Ala. 335.

The second ground of the defence is that without the assent of the defendant the lease was surrendered before its termination by arrangement between the plaintiffs and the lessee. In considering this claim it becomes necessary to look into the nature of the original contract. It was a lease for ten years, containing many covenants on the part of the lessee, of which one was that certain rent should be paid monthly, and another, that neither he nor his successors or assigns, or "others having their estate in the premises," would assign the lease without first obtaining the written consent of the lessors "or of those having their estate in the premises." The lease further provided that if the lessee should "neglect or fail to perform and observe any or either of the covenants . . . which on his part are to be performed," then the lessors might "immediately or at any time thereafter, and whilst such neglect and default continues, and without further notice or demand" enter into the premises and "repossess the same as of their former estate, . . . without prejudice to any remedies which might otherwise be used for arrears of rent or preceding breach of covenant," and that upon such entry the term should cease. The defendant guaranteed the prompt payment of the rent and the faithful performance of all the covenants of the lessee.

At the time of the surrender dated November 1, 1902, the rent for three months was due and unpaid and actions for the collection of the same had been begun against the lessee, and the liability of this defendant to pay the same also had become fixed.

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Under these circumstances, instead of forcing the lessors to make a formal entry into the premises the tenant consented to surrender the estate, thereby relieving the lessors from the necessity of such entry. The transaction was in substance a termination of the estate in accordance with its original terms. It was simply applying the original contract to a condition of circumstances which had been anticipated therein, and substantially in a manner therein provided for. In a word, the term was ended substantially as it was provided that it should be ended; and the consent of the defendant, the guarantor, to such an ending must be presumed. Moreover, by the terms of the lease the defendant never could have become the assignee of the lease or have held possession under it if an entry had been made for possession by the lessors. The obligation to pay the past rent was not changed by the surrender, and the liability of the defendant to pay it, which before the surrender had become fixed, continued notwithstanding the termination of the lease. See *Kingsbury* v. *Westfall*, 61 N. Y. 356.

Judgment reversed; judgment for the plaintiffs for $440.30, *with interest from the date of the writ.*

ADELAIDE D. SMITH *vs.* LOUIS E. P. SMITH.

Suffolk. November 20, 1905. — March 2, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Marriage and Divorce. Practice, Civil, Judgment or decree.

Under R. L. c. 152, § 33, a decree for alimony may be revised and altered after the expiration of the period during which the payment of alimony was ordered if there has been such a change of circumstances as to warrant it.

A decree for alimony directed a husband who was granted a divorce to pay to his former wife "as alimony the sum of $25 per week for two years from the date of the decree *nisi*." After the expiration of the two years the former wife filed a petition for additional alimony alleging inability to support herself by reason of ill health and bodily weakness. The court made a decree in substance as follows: "The form of the former decree indicates that the judge intended that the alimony then ordered to be paid should be in full for all alimony to which the petitioner was entitled, but this is not entirely clear, and by reason of the

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present condition of the petitioner it is ordered that the respondent pay to the petitioner $15 per week for one year." *Held*, that the order allowing further alimony must be construed to include a finding that there was a change in the circumstances of the petitioner since the former decree was made.

THE following statement of the case is taken from the opinion of the court:

This was a petition for additional alimony. A divorce was granted on January 9, 1903, to the present respondent, the husband, for gross and confirmed habits of intoxication on the part of the present petitioner (originally the libellee). In the decree for divorce the question of alimony was reserved for future consideration. On February 18, 1903, a decree was made directing the present respondent (the libellant in the original proceedings) to pay to the libellee (the present petitioner) "as alimony the sum of twenty-five dollars per week for two years from the date of the decree *nisi*, to wit, January nineteen, A. D. 1903." After the expiration of said two years, to wit, on February 11, 1905, this petition for additional alimony was filed. The material allegations of the petition are: "That your petitioner is without means of support; that your petitioner is unable, by reason of ill health and bodily weakness, to support herself; that said Louis E. P. Smith is of ample ability to contribute to the support of your petitioner, his former wife." On this petition the following order was made on April 1, 1905: "The form of the order or decree in respect to alimony made by the late Chief Justice Mason on February 18, 1903, indicates that he intended that the alimony then ordered to be paid, should be in full for all alimony to which the petitioner was entitled, but this is not entirely clear, and by reason of the present condition of the petitioner, it is ordered that the respondent, Louis E. P. Smith, pay to the petitioner, Adelaide D. Smith, fifteen dollars per week for one year from February 18, 1905, the same payable weekly." From this order an appeal was duly taken to this court.

S. K. Hamilton & T. Eaton, for the respondent.

J. R. Murphy, for the petitioner.

LORING, J. [After the foregoing statement of the case.] It is not necessary to decide whether the original decree in the case at bar was a final adjudication on the alimony to be paid. If this order is taken to have been a final adjudication upon the

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question of alimony (using that word to mean payments at stated periods), in case there was a change after the date of the decree in the circumstances of the parties or either of them, which in justice required that additional alimony should be paid, the court could make the order for further alimony. It is not necessary in the case at bar to consider what the rule is in case of a decree or order for the payment of a sum in gross by way of alimony. Alimony, like the custody of children, (as to which see R. L. c. 152, § 25,) is a matter which from its very nature cannot be finally disposed of. If, for example, a large annual allowance by way of alimony were made to a wife, to be paid by a wealthy husband, and without his fault the husband afterwards should be reduced to penury, there ought to be power in the court to make such change in the alimony decreed to be paid by him as this change in his circumstances required.

Such is the rule at common law in England, *De Blaquiere* v. *De Blaquiere*, 3 Hagg. Ecc. 322, and, by statute at least, in this Commonwealth. By Rev. Sts. c. 76, § 36, (following a less explicit provision in St. 1785, c. 69, § 5,) it is provided that "after any decree for alimony, . . . the court may, from time to time, on the petition of either of the parties, revise and alter their decree, . . . respecting any of the said matters, which they might have made in the original suit." This has been re-enacted (Gen. Sts. c. 107, § 47; Pub. Sts. c. 146, § 39) and is now R. L. c. 152, § 33. Under this act the amount of alimony may be changed if there is a change in the circumstances of either party making a change just. *Knapp* v. *Knapp*, 134 Mass. 353. *Southworth* v. *Treadwell*, 168 Mass. 511.

The respondent in the petition now before us has contended that R. L. c. 152, § 33, is limited to a revision of a decree for alimony "pending the full performance of the original decree." But in our opinion that is not the true construction of the act.

There is nothing in the language of the act or in the nature of the provisions of it which gives countenance to that construction. The language of the original act (Rev. Sts. c. 76, § 36) is "after any decree for alimony," "the court may from time to time," "revise and alter their decree," and this wording remains substantially unchanged. See R. L. c. 152, § 33.

There is no reason for limiting a court which is to have power

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to revise a decree to the time during which the decree is being performed. If, for example, a court on a bill to charge land with payment of an annuity makes a decree establishing such a charge on the land, the court has no power to revise or alter the decree after it is once made, whether the appeal is made during the life in question or after the death of the life tenant in case payment of the annuity was in arrears when she died. The inherent difference between a decree in an ordinary case (such, for example, as a decree establishing a charge on land to pay an annuity) and a decree for alimony does not result in a power to change pending performance, but does result in a power to make a change in the decree for alimony whenever a change in circumstances demands that a change should be made in the decree.

Finally, *Knapp* v. *Knapp*, 134 Mass. 353, is an authority against the respondent. That was a writ of *scire facias*, brought against the executrix of a libellee who had been ordered, by a decree made twenty-six years before, to pay to his wife by way of alimony $250 a year, none of which ever had been paid. The writ was denied by a single justice. On appeal that order was reversed and the case was directed to stand for hearing because the court had power at that time to revise and alter the decree.

In the case at bar, we are of opinion, with some hesitation, that the order allowing further alimony must be construed to be a finding that there was a change in the circumstances of the libellee (the present petitioner).

Decree affirmed.

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TIMOTHY HORRIGAN *vs.* BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. November 20, 1905. — March 2, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Negligence, Employer's liability.

A street railway company is not liable to a car cleaner employed in one of its car houses for injuries from falling through an opening in the floor of the car house from which an iron ventilating grating had been removed by another of its car cleaners who carelessly neglected to replace it.

TORT by a car sweeper employed by the defendant for injuries from falling through an opening in the floor of the Reservoir car house of the defendant at Brookline. Writ dated March 16, 1903.

At the trial in the Superior Court before *Richardson*, J. it appeared that the plaintiff at about five o'clock in the morning of February 10, 1903, was engaged in affixing advertising signs to the dashers of cars in the car house, and found it necessary to go to a switch board to turn on the electric lights in a part of the building that was dark; that in the floor of the passageway leading to the switch board there usually was an iron ventilating grating eighteen inches by twenty-four inches set flush with the floor; that this was one of a number of such gratings put in to keep the floor dry, there being a cellar air space underneath; that this grating had been taken up on the previous afternoon by another car sweeper, who had put some dirt down the hole and left the grating out of place, leaning against the wall; and that the plaintiff proceeding in the darkness through the narrow passage fell through the grate hole a distance of six or seven feet and was injured.

At the close of the plaintiff's evidence the judge ordered a verdict for the defendant; and at the request of the parties reported the case for determination by this court, with a stipulation of the parties that if on the evidence the jury would have been warranted in finding a verdict for the plaintiff, judg-

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ment was to be entered for the plaintiff in the sum of $2,000; otherwise, judgment was to be entered for the defendant.

R. H. Sherman, (*C. C. Johnson* with him,) for the plaintiff.

E. P. Saltonstall, (*S. H. E. Freund* with him,) for the defendant.

HAMMOND, J. There was no evidence of the negligence of the defendant. The plaintiff did not contend that the grating was a defect in the floor. It was there properly as a ventilator, and was not intended for any other purpose. It was removed without the defendant's authority, by the plaintiff's fellow employee, who carelessly neglected to replace it. The defendant as against the plaintiff was not bound to anticipate that it would be so used.

Judgment on the verdict.

COMMONWEALTH *vs.* EDWIN M. WHITE.

Plymouth. November 20, 1905. — March 2, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Lord's Day. Cranberries.

Gathering cranberries on the Lord's day when there is an unusually large crop but no sudden and unexpected emergency is not a work of necessity within the meaning of St. 1904, c. 460, § 2.

COMPLAINT under St. 1904, c. 460, § 2, received and sworn to in the Third District Court of Plymouth on September 20, 1904, charging that the defendant at Carver on September 18, 1904, that being the Lord's day, did labor, business and work, to wit, the gathering of cranberries, the same not being a work of necessity or charity.

The case came by appeal to the Superior Court where it was tried before *Lawton*, J.

There was evidence tending to show that the defendant on the day named in the complaint and for some time before was a part owner and the superintendent and sole manager of seventeen cranberry bogs in the town of Carver, upon which four gangs of

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pickers were at work on the Sunday in question; that on that day, which was pleasant, he was seen by the complainant, a constable, at a short distance from the bogs driving toward them; that his attention was called to the fact that pickers were at work on the bogs, and he thereupon asserted his intention to continue to do this work on Sunday, saying that he had about ten or fifteen thousand barrels, and would spend it all in fighting rather than quit working Sundays; that later on the same day he was seen on the premises somewhere between the screen house and the bogs while the pickers were at work; and there was evidence tending to show that on that day the work was carried on under his superintendence.

He testified that he had, on the Sunday in question, from three hundred and fifty to four hundred pickers at work; that he could not harvest the crop without working on Sunday; that he had been in the habit of gathering on Sundays; and that he had picked cranberries every Sunday since he had been in the business. He admitted that he had said to the complainant that he could not afford to stop working on Sunday and that he should keep on. He also said, on cross-examination, that the only reason he picked on Sunday was to save his crop; that if he had employed men enough, one sixth more, he could have done the same work in six days that he was doing in seven; that the crop this year was the largest they ever had, almost three times greater than that of any previous year; that he knew the last of July or the first of August that they were going to have such a crop, and that he should have to employ a great many more men to take care of it; that he could not accommodate any more men; that they lived in shanties owned by him; that the shanties cost money; that he did not try to put up tents; that he began to employ three hundred or four hundred men about September 15 and kept them from that time on.

At the close of the evidence the defendant among other requests asked the judge to rule, that gathering cranberries on the Lord's day is not necessarily unlawful; that the question depends upon the existence of a reasonable necessity, and it is only when the work is clearly unnecessary that the statute is violated; that if, owing to the size of the crop, the difficulty of procuring or housing labor, the prospect of frost or the danger of the fruit

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getting overripe, and other circumstances, the defendant believed, and had reason to believe, that the crop might be injured or lost if he did not gather it on the Lord's day, he was justified in so doing.

The judge refused to give these and other instructions requested by the defendant. He instructed the jury, in substance, that the work alleged to have been done was not, under the circumstances, work of necessity within the meaning of the statute, and submitted the case to them upon the issue of fact whether the defendant gathered cranberries upon the day named in the complaint. The jury returned a verdict of guilty; and the defendant alleged exceptions.

S. H. Tyng, (*H. T. Lane* with him,) for the defendant.

Asa P. French, District Attorney, for the Commonwealth.

HAMMOND, J. The main question is whether the evidence would warrant a finding that the work in question was one of "necessity" within the meaning of that word as used in the statute, (St. 1904, c. 460, § 2,) which, with certain exceptions not here material, makes it a criminal offence to do on the Lord's day "any manner of labor, business or work, except works of necessity and charity."

In construing this statute it is to be borne in mind that so far as material to the question before us, it is simply the continuation of a law which from a very early time in the history of the Colony has been constantly upon our statute books. It is one of a series of statutory provisions enacted to secure the proper observance of the Lord's day, as understood by our forefathers. Their idea of the Lord's day, the manner in which it should be spent, and the object of the system of statutes passed from time to time to secure its proper observance are set forth in the various preambles to those statutes. One of these is in the following language: "Whereas it is the duty of all persons, upon the Lord's Day, carefully to apply themselves, publickly and privately, to religion and piety, the prophanation of the Lord's Day is highly offensive to Almighty God, of evil example, and tends to the grief and disturbance of all pious and religiously disposed persons; therefore," etc. See Prov. St. 1760–61, c. 20, § 1; 4 Prov. Laws, (State ed.) 415. Perhaps the most instructive preamble is that which precedes St. 1791, c. 58, which was the first

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general statute passed on this subject after the adoption of our State Constitution. It reads as follows: "Whereas the observance of the Lord's Day is highly promotive of the welfare of a community, by affording necessary seasons for relaxation from labor and the cares of business; for moral reflections and conversation on the duties of life, and the frequent errors of human conduct; for public and private worship of the Maker, Governor and Judge of the world; and for those acts of charity which support and adorn a Christian society: And whereas some thoughtless and irreligious persons, inattentive to the duties and benefits of the Lord's Day, profane the same, by unnecessarily pursuing their worldly business and recreations on that day, to their own great damage, as members of a Christian society; to the great disturbance of well disposed persons, and to the great damage of the community, by producing dissipation of manners and immoralities of life: Be it therefore enacted," etc. Such was the idea of the Lord's day for the observance of which this system was devised.

It is argued by the defendant that the times have changed and with them have also changed ideas, manners and customs, and that what was formerly regarded as unnecessary may now be regarded as necessary. To a certain extent this may be true. In so far as changes in physical matters affect the question of necessity, they may be properly considered. But changes in the view of people as to the nature of the Lord's day, or as to the manner in which it should be spent, whether such changes are for the better or for the worse, are not to be considered. So far as respects such changes alone the word "necessity" has the same meaning as when first inserted in this system of statutes. It was originally inserted to secure the observance of the Lord's day in accordance with the views of our ancestors, and it ever since has stood and still stands for the same purpose. In interpreting it, the precepts set forth in the preambles above quoted must still be borne in mind. As said by Ames, J. in *Davis* v. *Somerville*, 128 Mass. 594, 596, in speaking of a similar statute: "Our Puritan ancestors intended that the day should be not merely a day of rest from labor, but also a day devoted to public and private worship and to religious meditation and repose, undisturbed by secular cares or amusements. They saw

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fit to enforce the observance of the day by penal legislation, and the statute regulations which they devised for that purpose have continued in force, without any substantial modification, to the present time [1880]. Whatever inconveniences might result at the present day from the literal and general enforcement of the Lord's day act, and whatever hard cases may have arisen under it, it is still the law of the land, to be judicially interpreted and administered according to its true intent and meaning, and upon the same rules as would govern us in the interpretation of any other statute." If any changes are to be made they should be made by the Legislature.

In this spirit must this statute be interpreted, and in the light of this method of interpretation it is clear that the defendant has not shown that his work was one of necessity. Without going over the evidence in detail, it is sufficient to say that here there was no extraordinary, sudden and unexpected emergency. The crop was large, it is true, but that it was likely to be large had been known for weeks. The weather was only what might have been expected. The substance of the testimony was simply that in gathering the crop it was somewhat less expensive and more convenient to work seven days in the week rather than six. That is not enough. Such testimony falls far short of showing "necessity" within the meaning of the statute. The case must be classed with *Commonwealth* v. *Sampson*, 97 Mass. 407; *Commonwealth* v. *Josselyn*, 97 Mass. 411; *McGrath* v. *Merwin*, 112 Mass. 467, and similar cases.

The question whether the defendant was engaged in the work was left to the jury under proper instructions. We see no error in the manner in which the court dealt with the defendant's requests for instructions. In view of the nature of the exception to the exclusion of the evidence as to the advice of counsel, we understand it to be waived.*

Exceptions overruled.

* The defendant offered to show that the work in question was carried on under the advice of counsel. The judge excluded the evidence, and the defendant excepted. "This evidence was offered solely to meet the contention that the defendant wilfully defied the law."

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MICHAEL McLAUGHLIN *vs.* RUTH L. SAYLE & others.

Suffolk. November 22, 1905. — March 2, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Mechanic's Lien.

On a petition to establish a mechanic's lien for work and labor performed and furnished in the erection of a building under a contract with the contractor who built it, if it appears that the petitioner failed to perform his contract, that the contractor suffered loss from this cause and that the work furnished by the petitioner was of no value to the contractor, a jury is not justified in finding for the petitioner.

PETITION, filed in the Municipal Court of the City of Boston for the District of Roxbury on July 17, 1900, and amended on July 31, 1900, to establish a mechanic's lien for work and labor performed and furnished by the petitioner under a contract with the respondents John C. Walsh and D. Cronan, doing business under the name of J. C. Walsh and Company, in the erection of two dwelling houses on the land of the respondent Sayle on Homestead Street in Boston designated as House A. and House B.

On appeal to the Superior Court the case was referred to an auditor. Later the case was tried before *Wait*, J. upon the auditor's report and oral testimony as stated in the opinion.

At the close of the evidence the judge ordered a verdict for the respondents, and by agreement of the parties reported the case for determination by this court with the stipulation that, if the jury would be justified in finding for the petitioner, judgment should be entered establishing the lien for $550.98 and interest; otherwise, judgment should be entered upon the verdict.

J. H. Hinckley, for the petitioner.

James J. McCarthy, for the respondents.

HAMMOND, J. After a very full hearing before the auditor, which "took a long time" and in which all the testimony was gone into, the auditor reported among other things as follows:

"When the plaintiff ceased to furnish labor on June 21st he had about one third of the work performed that was called for

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by his contract. I find, however, that the work was not performed in a skilful and workmanlike manner, nor in accordance with the plans and specifications. The sill laid on the top of the brick wall of house A. was not laid at equal distance from the outside face of the brick wall as required by the plans. Many of the partitions were crooked, bulging in places, and out of plumb; two of the partitions which were required to be straight by the plans had a jog of one or two inches; on account of the imperfect placing of partitions some rooms and halls were not square. The studding in many of the partitions was insufficient and some of the studs were too short to furnish any support for the floors above them, and many of the floors sagged some two inches and were not level. The floor joists were not properly bridged and in consequence of this the brick arches of some of the fireplaces were insufficiently supported and settled or fell; the work also was defective in other respects, and was not done to the satisfaction of the architect.

"I find that these defects and imperfections constituted a breach of the plaintiff's contract, and justified J. C. Walsh & Co. in preventing him from continuing the work after June 21st. After that date J. C. Walsh & Company completed the work comprised in the plaintiff's contract with their own men, some of the work done by the plaintiff had to be taken out and rebuilt, the rest of it was straightened and remedied in the most economical way available.

"For remedying the defects in the plaintiff's work and completing the work which the plaintiff had contracted to do for $1,875, J. C. Walsh & Co. paid out $2,097

"They also paid to the plaintiff, as stated in the plaintiff's account 325

Total $2,422,

so that J. C. Walsh & Co. have lost $547, besides their profit by reason of the plaintiff's failure to perform his contract. I find that the work furnished by the plaintiff was of no value to J. C. Walsh & Co., that he owes them nothing therefore and that the plaintiff has no lien on the property of the respondent."

At the trial before the jury the petitioner introduced in opposition to the report the evidence of himself and his foreman, but we think that their testimony, while in some respects incon-

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sistent with the statements contained in the report, came far short of meeting it, and that on the whole the evidence was insufficient to warrant a verdict for the petitioner. See *Wyman* v. *Whicher*, 179 Mass. 276, and cases there cited.

Judgment on the verdict.

REUBEN BROOMFIELD *vs.* WILLIAM A. SHEEHAN.

Suffolk. November 23, 1905. — March 2, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Practice, Civil, Exceptions. *Rules of Court.*

Sending by mail to the adverse party a copy of a bill of exceptions without any signature of counsel and with no accompanying letter or memorandum as to the filing thereof is not a notice to the adverse party of the filing of a bill of exceptions within the meaning of R. L. c. 173, § 106, and Rules 47 and 29 of the Superior Court.

TORT against a constable of the city of Boston for the alleged conversion of certain goods and chattels attached by him. Writ dated June 10, 1897.

At the trial in the Superior Court in October, 1903, before *Gaskill*, J. the jury returned a verdict for the defendant. The plaintiff reduced to writing a bill of exceptions and filed it with the clerk of the court within twenty days after the verdict.

The defendant moved to dismiss the bill of exceptions because no notice of the filing was given to him. At the hearing on the motion it appeared that within the required time after the filing of the bill of exceptions the attorney for the defendant received through the mail, postage prepaid, a copy of the bill of exceptions without signature of counsel, but that there was no letter accompanying the copy, and no memorandum or statement as to the filing thereof.

The plaintiff requested the judge to rule as follows:

First, If the court finds that the exceptions in the case at bar were properly reduced to writing and a copy of such exceptions so reduced to writing was delivered by the plaintiff to the de-

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fendant within the time required for filing such exceptions, and for giving notice thereof to the adverse party, then the delivery of such copy amounted to the giving of a sufficient notice by the plaintiff to the defendant of the filing of such exceptions.

Second, On all the evidence before the court a sufficient notice of the filing of the bill of exceptions in question was given.

The judge refused to rule as requested and allowed the defendant's motion. The plaintiff alleged exceptions.

S. R. Cutler & H. W. James, for the plaintiff.

P. B. Kiernan, for the defendant.

HAMMOND, J. The exceptions were duly filed, and the only question is whether "notice thereof" was given as required by law.

"Exceptions shall be reduced to writing and filed with the clerk, and notice thereof shall be given to the adverse party . . . within twenty days after the verdict is rendered." R. L. c. 173, § 106. Rule 47 of the Superior Court. The notice "shall be in writing." Rule 29 of the Superior Court.

A sending to the adverse party by mail of a copy of the bill of exceptions, without any signature of counsel, without any accompanying letter and without any "memorandum or statement as to the filing thereof," plainly comes far short of a notice that any bill, much less any properly signed bill, has been filed.

Exceptions overruled.

GEORGE W. GREEN *vs.* STAR FIRE INSURANCE COMPANY.

Suffolk. November 24, 1905. — March 2, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Insurance, Fire. *Agency*. *Practice, Civil*, Costs.

The unrestricted general agent in this Commonwealth of a fire insurance company organized under the laws of another State has authority not only to accept risks and receive proofs of loss but also to adjust and settle losses, and the company is bound by his acts although contrary to special instructions which are unknown to the insured.

The authority of an insurance broker acting for one desiring insurance may be

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found to have ended when a policy for the insurance has been countersigned by the general agent of the company and has been given by him to his clerk for delivery directly to the insured to whom it subsequently is delivered without the intervention of the broker.

Where a policy of insurance against fire upon mortgaged real estate provides that it shall be payable in case of loss to the mortgagee, if an action on the policy is brought by the insured without the knowledge of the mortgagee a subsequent assent of the mortgagee is sufficient to enable the plaintiff to maintain his action. The question whether in such a case the plaintiff is entitled to costs was not raised by the record.

CONTRACT on a policy of insurance against fire for $697.67 and interest, alleged to be the amount agreed upon by the parties of a loss by fire on August 7, 1904, on a building on Ocean Avenue in the town of Revere. Writ in the Municipal Court of the City of Boston dated November 19, 1904.

On appeal to the Superior Court the case was tried before *Fox*, J., without a jury.

Frederick L. Cutting, insurance commissioner for the Commonwealth, testified that the Star Fire Insurance Company is a Kentucky corporation authorized to do business in Massachusetts. He produced from the records of his office the following documents:

"Whereas the Star Fire Insurance Company of Louisville, Kentucky, has applied for authority to transact the business of fire insurance in the Commonwealth of Massachusetts and whereas the said company has appointed Mitchell and Tyler of New York City as managers of its Eastern Department, and for the more convenient transaction of business therein has given said managers authority to appoint agents in said Commonwealth,

"Be it known to all to whom these presents shall come that the said company through its President and Secretary hereby requests and authorizes the insurance commissioner of said Commonwealth to issue agents' licenses to the appointees of said Eastern managers and hereby agrees to be bound by such actions of said managers the same as if they had been done by the officers of said company.

"Florian Cox, President.
Edward J. Watkins, Secretary.

"December 28, 1903."

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"The Star Fire Insurance Company of Louisville, Kentucky.
Incorporated 1903.

"Be it known that Charles F. Mitchell and William Tyler, comprising the firm of Mitchell and Tyler in the City of New York in the Borough of Manhattan in the State of New York, are appointed and by these presents duly constituted managers for the Star Fire Insurance Company of Louisville, Kentucky, for the Eastern Department of said company, comprising the following States, namely: — New York, New Jersey, Pennsylvania, Connecticut, Rhode Island, Massachusetts, New Hampshire and Maine, with full power to receive proposals for insurance against loss and damage by fire in said territory, and to appoint local agents therein, to fix rates of premium, to receive moneys for the same and to countersign, issue and renew and make endorsements upon and consent to the transfer of policies of insurance signed by the President and attested by the Secretary of said Star Fire Insurance Company, subject to the rules and regulations of said company, and duly to attend to all such lawful acts, business and instructions pertaining to said Department as may from time to time be given in charge by the undersigned officers of the Star Fire Insurance Company.

"In witness whereof these presents are signed and issued in the City of Louisville, Kentucky, this twenty-second day of December, 1903.

"The Star Fire Insurance Company,
"By Florian Cox, President.

(Corporate seal.)

"Attest: Edward J. Watkins, Secretary."

"Office of the Star Fire Insurance Co., of Louisville, Ky.
"New York, April 27, 1904.

"To the Insurance Commissioner of Massachusetts:

"The following is a list of all persons and firms constituting the agents of this company in your State, and for whom we request licenses issued or renewed for the year beginning April 1st, 1904.

"Herewith find check in payment of three licenses at three dollars each.

"Mitchell & Tyler,
"Managers.

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"Name Schedule Residence.
"John H. Madden, 44 Kilby St., Boston and Lynn.
"Patrick H. Killdea, Leominster."

The license, number 61014, read as follows:

"Commonwealth of Massachusetts
"Insurance Department.

"Be it known unto all to whom these presents come that the Star Fire Insurance Company of Louisville, Ky., being possessed of the requisite funds and having complied with the law is authorized through licensed resident agents to transact the business of fire insurance in this Commonwealth.

"Be it also known, that John H. Madden of Boston & Lynn has duly complied with the laws relating to agents of such companies and is authorized to transact within this Commonwealth for the aforesaid company the business of fire insurance, so far as he may be legally empowered to do by the aforesaid company as its agent.

"This certificate of authority shall continue in force until the first day of April next unless sooner revoked for non-compliance with law or cancelled by the company.

"In testimony whereof, witness my hand and the seal of the Department this twenty-ninth day of April in the year nineteen hundred and four.

"Frank H. Hardison,
"Deputy Insurance Commissioner."

John H. Madden testified that he was an insurance agent and had been in the business since 1891 with offices at Lynn and Boston. He was agent of the Star Fire Insurance Company in 1904 with an office at 44 Kilby Street, Boston. He received and countersigned policies of the defendant, the policies being sent to him signed by the officers. He countersigned the policy on which the present action was brought. He gave it to his clerk. After the fire the policy was brought or sent back to his office and there cancelled, and sent to the company. Later he gave the plaintiff a receipt for the policy and a memorandum.

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The policy was in the Massachusetts standard form with a rider making the policy payable in case of loss "to mortgagee as interest may appear." Madden knew of the fire and one Cross had adjusted the loss on the policy before Madden gave the plaintiff the memorandum above mentioned which set forth merely the important terms of the policy. On the forenoon of the day after the fire, before Madden received the policy back from the plaintiff, he was notified by the plaintiff of the loss. The house that was burned was one of those at Revere described in the policy.

Madden notified Cross of the loss and told him to attend to it. One Robertson, a carpenter, was present with Cross in adjusting the loss. Cross later gave Madden a proof of the loss and he gave this to one Cadigan, an agent of the defendant.

After the fire Madden gave to the plaintiff a memorandum of the loss, stating it to be $697, due about October 11, 1904. He gave this to the plaintiff as a receipt for the policy which had been received by him after the fire. The amount of loss was stated in the proof of loss. The proof of loss was in the handwriting of Cross. It was a usage in the business for the adjuster or some one in his office to make out the proof of loss.

One Holden, an insurance broker, who was dead at the time of the trial, controlled the plaintiff's insurance business. He was the broker acting for the plaintiff in placing this insurance. It was he who suggested Madden's making out the memorandum. It was Holden who applied for the policy.

The premium for the policy was $75. On July 28, 1904, the plaintiff gave Madden's clerk his check for $37.50 and received from him a receipt for this as paid on the premium, stating that the balance was to be paid in September, 1904.

Madden testified that he never saw this check until the trial in the court below. It was received by his clerk and by him deposited to Madden's account as usual without his knowledge. Holden was credited with it as broker for the plaintiff.

Madden received within a day or two of its date the following letter:

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"The Star Fire Insurance Company, Louisville, Ky.
"Eastern Department,
"Mitchell & Tyler, Managers.
"New York, June 27th, 1904.
"Mr. John H. Madden, Boston, Mass.,
"Policy No. 500276 — Geo. W. Green — Boston, Mass.
"Dear Sir: —

"The subject of Revere Beach was thoroughly gone into with Secretary Watkins, and notwithstanding all the persuasions which we could bring to bear upon the desirability of the business at the rate, we were still unable to impress the Company with the idea that this was good business, and as we thoroughly understand the situation now, we will avoid future friction by asking you to decline this business entirely, and relieve us of this line.

"We regret to be obliged to take this action, as this office itself feels that the business is all right. Your kindly attention will oblige.

"Yours truly,
"Mitchell & Tyler,
"Managers."

This letter referred to the property on which the loss occurred. Within a day or two after receiving this letter Madden communicated its contents to Holden and said he was sorry and told him to tell the plaintiff. Holden told Madden a few days later and before the fire that he had told the plaintiff. Madden never received any more money from the plaintiff after the receipt of the check above mentioned.

On redirect examination Madden said, "I note that the Massachusetts standard policy by its terms requires written notice to the assured in order to effect cancellation. I never had any conversation about a new policy to take the place of the old.

"Green brought in the policy two or three days after the fire. I had never seen him before, and I had not seen the policy since it was countersigned until he brought it into the office. I did not get the policy back before the fire, though I asked for it."

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The plaintiff testified as follows:

"I own the property at Revere, where the loss occurred. I insured it some time in June, 1904. Previous to the fire I got a document resembling a policy of fire insurance in Massachusetts standard form from Denney, Madden's clerk. I got this at the time when I gave the check for $37.50, namely, on July 28, 1904. I put the policy in my safe and kept it there until August 20. The fire occurred August 7, 1904. After the fire I had a talk with Holden about the balance of the insurance in which he suggested that I surrender the old policy. There having been a $700 loss there would be only $800 due if anything should happen in the future, and he suggested that I surrender that policy and take out another policy for the same amount or a larger one with that company, and he took that policy to Madden for the purpose of issuing a new policy. That was the same policy I got when I gave the check on July 28. I met Cross and Robertson after the fire and we agreed upon $697.67 as the amount of loss. I notified Madden of the fire and Cross was notified by Madden. On the day following Cross's visit to the premises I signed and swore to the statement in Cross's office. Later I saw Madden with reference to when I might expect to get the money and he said I would have to wait about ten days till he heard from New York. About September 11, 1904, he gave me the receipt put in evidence in this case. He said he had heard nothing from the insurance company. I went to Madden again later. He said he had heard nothing from New York. At that time he gave me the copy of the policy which was produced first in evidence in this case. I was never notified by any one of any cancellation of the policy.

"I received the bill put in evidence above from Madden. From the time when the policy was issued up to the present, Mrs. Catherine Soper Eastwood has held a mortgage on the property covered by the policy for the sum of $1,500. She did not know of the issuance of the insurance and I had no agreement with her about insurance. She executed the following paper:

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"Know all men by these presents that I, the undersigned, hereby waive any cause of action or rights of action in favor of George W. Green for any loss on any policy of insurance issued to him by the Star Fire Insurance Company of Kentucky by reason of any interest I may have or have had as mortgagee of the property insured by said policy.

"Witness my hand and seal.

"Catherine Soper Eastwood." (Seal.)

On cross-examination the plaintiff testified that Mrs. Eastwood had been first informed of the pendency of the present action and had given this instrument since the trial of the case in the court below.

The defendant introduced no evidence, but at the close of the plaintiff's evidence requested the judge to make among others the following rulings:

"1. On all the evidence the plaintiff cannot recover.

"2. Where a policy of fire insurance is payable in the event of loss to a mortgagee as his interest may appear and there is in fact at the time of the policy and of fire and of suit a mortgagee holding continuously, the assent of the mortgagee is necessary to enable the mortgagor to maintain the suit on the policy for the loss; and where such assent is given only after the institution of the action the defendant is not liable for costs.

"3. A person appointed an insurance agent with such powers only as have been shown in this case as possessed by John H. Madden has no authority by implication of law to issue a policy upon a risk which has been declined by the company or its general agents, and it is not necessary for the insurance company to show that lack of authority was brought to the attention of the intending assured.

"4. An insurance agent given only such powers as have been disclosed by the evidence as those possessed by John H. Madden has no authority implied in law to select an adjuster to agree on behalf of the company to the amount of the loss.

"5. The delivery of the proof of loss to an insurance agent with only such powers as are disclosed by the evidence as possessed by John H. Madden or by Cadigan is not a delivery to the Company."

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The judge refused to make any of these rulings, and the defendant excepted.

The judge, among other findings of fact, found that Madden was the only Boston agent of the defendant when this policy was issued, and as such agent had authority to write and countersign the defendant's policies.

He ruled as follows:

"I am of the opinion that the plaintiff holding the regularly executed policy of the company is not concluded by secret instructions sent by the company to its Boston agent, even if it be held that the agent violated his instructions in delivering the policy in question."

The judge found for the plaintiff in the sum of $708.12; and the defendant alleged exceptions.

E. F. McClennen, (*H. F. Lyman* with him,) for the defendant.

H. Dunham, for the plaintiff.

SHELDON, J. The first and most important question raised by these exceptions is as to the authority of Madden, the defendant's Boston agent. He was apparently appointed by Mitchell and Tyler, the managers of the defendant's eastern department; or rather it would be more correct to say that he is stated by Mitchell and Tyler in their letter to the insurance commissioner to be an agent of the company in this State, without any express limitation being stated to exist upon his authority, and without any statement being made of the nature or extent of that authority. If we refer to the previous communication made to the insurance commissioner by the defendant, which appears to contain the authority under which Mitchell and Tyler acted, we find that the defendant there states that it has given to them authority "to appoint agents" in this Commonwealth, and "requests . . . the insurance commissioner . . . to issue agents' licenses to" their appointees, and agrees "to be bound by such actions of said managers the same as if they had been done by the officers of said company."

The defendant is a Kentucky corporation, though authorized and wishing to do business in this Commonwealth. It is the case, then, of a foreign principal's appointing an agent without any statement of what his authority is, without any apparent limitation of that authority, to conduct a business which is under

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the close supervision of a special department of our executive government. R. L. c. 118. *Stuart* v. *Reliance Ins. Co.* 179 Mass. 434. Here, as in that case, there is nothing to show that Madden's authority was a limited one. Moreover, it is to be borne in mind that with these facts appearing the defendant did not see fit to offer evidence that any actual limitations ever had been in fact imposed on Madden's general authority. It seems to us that under such circumstances the judge before whom this case was tried without a jury had at least a right to find that Madden was not a mere special agent of the defendant with no other powers than those proved to have been expressly given; but that he possessed a broad and general authority, sufficiently large at any rate to warrant the finding which the judge has made as to the binding force of his actions upon the defendant. He was not, as in *Lohnes* v. *Insurance Co. of North America*, 121 Mass. 439, one who merely could receive applications, take risks and settle rates of premiums, and issue policies for the defendant. He was their agent, apparently without restriction, to transact the business, which would include not only the acceptance of risks, but the adjustment and settlement of losses. *Eastern Railroad* v. *Relief Ins. Co.* 98 Mass. 420. As in the case last cited, he well might have been found to be the defendant's agent for the purpose of doing its general business in this State. Apparently he was the only man with whom the defendant's customers in this Commonwealth dealt or were expected to deal. He was not a mere broker to forward applications, as in *Commonwealth Ins. Co.* v. *Fairbank Canning Co.* 173 Mass. 161. See *Wheeler* v. *Watertown Ins. Co.* 131 Mass. 1. The limits of his authority had not been defined by any enumeration of the powers which were given to him, as in *Hill* v. *Commercial Union Assur. Co.* 164 Mass. 406; *Parker* v. *Rochester German Ins. Co.* 162 Mass. 479; *Kyte* v. *Commercial Union Assur. Co.* 144 Mass. 43; and *Harrison* v. *City Ins. Co.* 9 Allen, 231, relied on by the defendant.

It is elementary law that private instructions limiting the authority of a general agent cannot bind one who deals with him without knowledge of them. *Brown* v. *Franklin Ins. Co.* 165 Mass. 565. Madden's authority must be determined by the nature of his business and the apparent scope of his employment

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therein. It cannot be narrowed by private or undisclosed instructions unless there "is something in the nature of the business or the circumstances of the case to indicate that the agent is acting under special instructions or limited powers." *Markey* v. *Mutual Benefit Ins. Co.* 103 Mass. 78, 93, quoted in *Brown* v. *Franklin Ins. Co., ubi supra.*

But the defendant argues that because Madden informed Holden, the insurance broker through whom the plaintiff's insurance was obtained, of the substance of this letter, the plaintiff was chargeable with notice of the actual limitation imposed on Madden's authority by this letter. The contention is that Holden's agency continued until its purpose was accomplished, that is, until the final contract of insurance was effected and the written policy delivered, and that knowledge of the agent gained during the continuance of the agency is imputed to his principal. It may be conceded that this language is generally accurate. But we think that it well might be found here that Holden's agency had in fact come to an end when Madden received and countersigned this policy some days before the letter in question was written; that Madden then gave it to his clerk to be delivered as it was in fact subsequently delivered to the plaintiff, and that the purpose of Holden's agency was then accomplished and his work finished. *Jones* v. *New York Ins. Co.* 168 Mass. 245. *Wheeler* v. *Watertown Ins. Co.* 131 Mass. 1. The agreement had been made, the policy prepared and countersigned, and the delivery was to be made to the plaintiff directly. The business was not all transacted between Madden and Holden, and there was nothing to indicate that the delivery of the policy was to be made to Holden, in which case the authorities cited by the defendant would have been applicable. We think that this notice was really given after his agency had been ended, as Madden knew, and cannot be regarded as notice to the plaintiff.

In our view it is not material to the decision of this case whether this policy did or did not become operative before the twenty-eighth day of July, 1904, when it actually was delivered to the plaintiff. After such delivery at any rate the defendant's right to cancel the policy depended by its terms upon the giving of a written notice to the insured and the tender to him of a rata-

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ble proportion of the premium; and there is no contention that either of these conditions was complied with. R. L. c. 118, § 60, standard form of policy. *Massasoit Steam Mills* v. *Western Assur. Co.* 125 Mass. 110.

Nor does it appear that Madden had no authority to insure or to deliver the policy without payment of the full premium; and there was evidence to warrant a finding that he waived payment of the total amount of the premium in cash, and delivered the policy upon the promise of the plaintiff to pay the balance of the premium in future. *Jones* v. *New York Ins. Co.* 168 Mass. 245, 248, and cases there cited. There is no provision in the policy making actual payment of the premium in cash a condition precedent to the issuing or the taking effect of the policy, as in *Dunham* v. *Morse*, 158 Mass. 132, 134; and decisions made upon such a policy have no bearing on this case. Whether the defendant is not now entitled to credit for the remaining one half part of the premium is not before us on these exceptions; nor does it appear that such credit was not in fact given to it.

We are of opinion accordingly that the judge rightly found that the plaintiff held a policy which was properly executed and was binding upon the defendant at the time of the fire; and the defendant's exceptions bearing upon this question must be overruled.

The defendant further contends that the conditions precedent to any right of action upon this policy were not shown to have been performed by the plaintiff, first, on the ground that there was no due rendering of a proof of loss to the company, and secondly that there was no reference to arbitrators as to the amount of the loss. But both of these contentions really are disposed of by what we already have said as to the authority of Madden, and may be briefly dealt with.

Madden's authority was, as we have heretofore shown, "to conduct the business of fire insurance" in this Commonwealth for the defendant, a foreign corporation. An essential part of that business was to receive proofs of loss, to adjust any losses or cause them to be adjusted, and to agree upon the amount of such losses or, in the absence of such agreement, to act in having that amount fixed by arbitration, as provided by the terms of the policy. The evidence was that he selected the adjuster;

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that the adjuster and the plaintiff agreed upon the amount of the loss, and that this agreement was ratified by Madden. It may perhaps be doubted whether there was any direct evidence that Teele or Cadigan had authority to act for the company; but the plaintiff's case rests sufficiently upon the authority of Madden, and any error, if there was one, in the findings or rulings made as to Teele or Cadigan was immaterial, and did not prejudice the defendant. See *Harnden* v. *Milwaukee Mechanics' Ins. Co.* 164 Mass. 382, 386; *Little* v. *Phœnix Ins. Co.* 123 Mass. 380. And after the amount of the loss had thus been fixed by agreement, there was nothing left for arbitration, and the stipulation therefor no longer had any force. *Wholley* v. *Western Assur. Co.* 174 Mass. 263. *Hayes* v. *Milford Ins. Co.* 170 Mass. 492.

The question whether the defendant is liable for costs in this action is not properly before us. It is argued, on a dictum of Shaw, C. J. in *Jackson* v. *Farmers' Ins. Co.* 5 Gray, 52, 57, that the defendant is not liable for costs because the mortgagee never assented to the bringing of this action, and never assented to its being prosecuted until after it had been brought and actually tried in the Municipal Court of the City of Boston. This assent was sufficient to allow the plaintiff to maintain the action. *Turner* v. *Quincy Ins. Co.* 109 Mass. 568. It may be doubted whether the question of liability for costs in such a case can be brought before us otherwise than by an appeal from the action of the clerk as to taxation under R. L. c. 203, §§ 20, 21, as in *Moore* v. *Cutter*, 8 Allen, 468. See *Coburn* v. *Whitely*, 8 Met. 272, 275. At any rate, it is not material to be considered in determining the question of the defendant's general liability in the action; and that is all that is now before us.

Exceptions overruled.

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HENRY COLLINS, trustee, *vs.* EMELINE A. POOLE & others.

HENRY COLLINS, as guardian, *vs.* EMELINE A. POOLE.

SAME *vs.* SAME.

JAMES H. POOLE & another, trustees, *vs.* EMELINE A. POOLE & others.

Middlesex. December 6, 1905. — March 2, 1906.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Equity Pleading and Practice, Hearing before master. *Practice, Civil*, Auditor, Appeal.

In a hearing before a master appointed by a single justice of this court in a case coming by appeal from the Probate Court, the report of an auditor appointed by the Probate Court under R. L. c. 165, § 56, which was filed in the case in the Probate Court and relates to the issues on trial is admissible as a part of the case which it is the duty of the master to hear.

APPEALS from a decree of the Probate Court in four cases, involving controversies as to the accounts of Henry Collins as trustee under the will of Seth B. Poole and as guardian of Emeline A. Poole.

The cases came on to be heard before *Braley*, J. upon a master's report and exceptions thereto.

Two questions were raised before the justice:

First, that at the hearing of the case before the master the report of the auditor, who was appointed in these cases by the Probate Court, was admissible in evidence in favor of Emeline A. Poole and James H. Poole, and that a ruling of the master excluding the auditor's report was erroneous.

Second, that the master erred in the adjustment of Collins's account as between the two estates, and that Collins should have been charged as guardian with a much larger amount than that shown by his account; and further, that by reason of his maladministration as guardian, as shown by the master's report, he should not in any event be allowed any compensation for his services.

Being of the opinion that the auditor's report made in these cases was admissible in evidence at the hearing before the mas-

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ter, the justice sustained the first exception of Emeline A. Poole and the first exception of James H. Poole, and ordered the other exceptions severally overruled, and entered a decree accordingly.

At the request of Henry Collins, and being of opinion that the decree so affected the merits of the controversy that the matter ought to be determined by the full court before further proceedings were taken, the justice reported the ruling for decision thereon by the full court. If the ruling was right, the remaining exceptions became immaterial, but if the ruling was found to be wrong, the remaining exceptions were of importance to the excepting parties.

L. S. Dabney & A. M. Lyman, for Henry Collins and his surety.

L. C. Southard, for James H. Poole, was not called upon.

F. N. Nay & W. Keyes, for Emeline A. Poole, were not called upon.

HAMMOND, J. These cases raise this question, namely: Is the report of an auditor duly appointed by the Probate Court under R. L. c. 165, § 56, admissible as evidence in a hearing before a master appointed by the Supreme Judicial Court in which on appeal from a decree of the Probate Court the case is pending? In discussing this general question it is to be predicated of course that the statements contained in the auditor's report would if admitted be pertinent and material to the subject matter before the master.

The statute reads thus: "After any account of an executor, administrator, guardian, trustee or other person who is required by law to render an account in the probate court has been filed therein, the judge of said court may, before approving it, appoint one or more auditors to hear the parties, examine vouchers and evidence and report upon the same to the court. The report shall be *prima facie* evidence upon such matters as are expressly referred to such auditors."

In *Webber* v. *Orne*, 15 Gray, 351, which was an action at law upon an account annexed, the lower court sent the case to an auditor, who made a report in favor of the plaintiff, and judgment was entered for him. The defendant appealed to the Superior Court, and the question whether in the trial in that

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court the auditor's report was admissible was raised and finally was brought to this court. It was decided that the report was admitted properly. In giving the opinion, Bigelow, J. takes notice of the fact that the statute (Rev. Sts. c. 85, § 15) required the originals of depositions and other original evidence or documents to be produced in the appellate court. But the substantial reason for the decision appears in the following language on page 352: "The validity of the report was not affected by the appeal. It formed no part of the judgment in the lower court. It was the report of an auditor duly appointed, which is made competent evidence by statute; and, like depositions and other duly authenticated papers, was admissible in all stages of the cause, when it was necessary and proper to offer proof."

In *Brigham* v. *Morgan*, 185 Mass. 27, the report of an auditor appointed under St. 1889, c. 311, of which the present statute is a re-enactment, was received as evidence at the hearing in the Supreme Court of Probate to which the case had come on appeal, and it was adjudged that it was admitted properly; but the objection then made was not the same as that which is made in the present cases. In the opinion in that case it is said that "the statute is remedial in its nature and should receive a construction consonant with its manifest purpose, which is to relieve the court from making a personal examination of the details of complicated accounts, and to enable it to call in the services of an auditor to assist." Another instance where the report of an auditor appointed by the Probate Court was received in evidence in the appellate court is to be found in *Willwerth* v. *Willwerth*, 176 Mass. 265. In this case the auditor's report, upon an appeal from the single justice, was taken as evidence by the full court, but it is proper to say that no question was raised about the admissibility of the report.

Upon general principles we think that there can be no question that the report of an auditor appointed by any court in which an action is pending follows the case wherever it goes; and when pertinent and material to the issue on trial, is admissible in whatever court the trial takes place.

It is contended however by the accountant Collins that even if this be so, the principle is not applicable when in the appellate

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court the case is referred to a master. In support of this contention it is urged among other things that the appointment of a master is in substance the rejection of the auditor's report, and that the master should be left to draw his own conclusions, and by the very reference he is expected to do that. The position is stated in the brief in this language:

"Apart from any statutory authority, courts in equity have inherent powers to appoint a master, and it is elementary that both the functions of a master and his findings differ materially from those of an auditor, the master's findings being conclusive, unless error is shown, while the findings of an auditor are only *prima facie* evidence upon such matters as are referred to him. In view of the master's responsibilities, it would seem that his findings should be based upon his own views and opinions, as to the credibility of witnesses, and the weight of evidence, and that in respect to the matters committed to him by the court and upon which his own views and findings are called for, he should not be answerable for or influenced by the opinions of any one other than himself. We contend that what the court ordered was a report of the master's findings based upon the evidence heard by him. To say that such evidence included the auditor's report is merely to beg the question."

But the position of the accountant upon this question is untenable. We have already said that the auditor's report is admissible in a hearing before the appellate court. It is evidence in the case when heard before the judge. If for any reason the judge sends the case to a master for trial, such trial is the only one the parties can have on the merits unless it is shown by a hearing on exception to the report of the master that he is in error. Unless the report of the auditor can be introduced at the hearing before the master it cannot be introduced at all in the appellate court. Under this view of the situation the report would be admissible if the case were heard on its merits by the judge and not if heard by the master. In the former case the party who has the right to the use of the report in his favor as a piece of evidence may avail himself of the right; in the latter case the right is gone, and that too without his fault. In other words, the nature of the evidence which can be introduced in his favor in a trial on the merits

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depends upon the particular judicial officer of the court by whom the case is heard. A construction of a statute which leads to results so unreasonable and unjust is not to be adopted unless it be indicated by the clearest language.

As stated in the language of the brief above quoted, "the functions of a master and his findings differ materially from those of an auditor, the master's findings being conclusive, unless error is shown, while the findings of an auditor are only *prima facie* evidence upon such matters as are referred to him." While it is true that the master is entrusted with this important duty and is under a corresponding responsibility, and while it is true that he must in the end act upon his own conclusions, it is equally true that he sits, as does any other judge, to try the case upon the evidence, and his conclusions must be based upon the evidence; and it is the right of the parties to offer, and his duty to receive, all material evidence exactly as in a trial before the judge. Moreover the report of the auditor is as likely to be as helpful to the master as to any other person hearing the case. The true principle is as stated by Bigelow, J. in *Webber* v. *Orne*, *ubi supra*, that the auditor's report is "admissible in all stages of the cause, when it was necessary and proper to offer proof." If the appellate court had appointed another auditor to hear the case instead of sending it to a master, the question presented would have been different. Such action by an appellate court doubtless would be regarded as equivalent to the revocation of the appointment of the first auditor and the consequent nullification of his report. But the mere reference of the case to a master cannot be taken as superseding the report of the auditor; and in this case there is nothing in the agreement of the parties or in the form of the reference which should take the case out of this general rule.

It is further contended by Collins that the record of the Probate Court does not show that any specific matter was given to the auditor to decide, or that he was asked to make any findings of fact upon any subject whatever. By an inspection of the form of the reference, however, it plainly appears that the thing referred to the master was in each case the account filed in the Probate Court. Anything involved in the account was therefore before him. The same subject was before the master, and it is

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to be assumed that the auditor's report contained statements material to the inquiry.

The ruling of the single justice as to this was correct. In the report upon which the case comes to us it is stated that if this ruling was right the remaining exceptions become immaterial. We have not therefore considered them, but in accordance with the terms of the report the decree sustaining the first exception of Emeline A. Poole and the first exception of James H. Poole, and overruling all the other exceptions must be affirmed; and it is

So ordered.

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SUPPLEMENT.

Opinion of the Justices to the Senate and House of Representatives.

Bonds were issued by the city of Boston under St. 1897, c. 500, on each of which under the requirement of that statute were stamped the following words: "East Boston Tunnel. The whole amount of the rentals for the use of and tolls for persons passing through the East Boston tunnel is pledged for the payment of the principal and interest of this loan." The statute provided that the city of Boston should collect from each person passing through the tunnel in either direction a toll of one cent, which under certain conditions might be reduced or abolished by the railroad commissioners on petition of ten citizens. *Held*, that the sale of the bonds with the above stipulation expressed on their face by direction of the Legislature created a contract with the purchaser of each bond which it was not in the power of the Legislature to impair; that the tolls referred to were those then established by law and that they could not be diminished without reducing the security to which the owners of the bonds were entitled.

In the stipulation on the face of the bonds issued to pay for the construction of the East Boston tunnel, stating as required by St. 1897, c. 500, § 17, that "the whole amount of the rentals for the use of and tolls for persons passing through the East Boston tunnel is pledged for the payment of the principal and interest of this loan," the words "the whole amount of the tolls" mean the net amount, and the city of Boston may deduct a reasonable charge for the cost of collection.

In the stipulation on the face of the bonds issued to pay for the construction of the East Boston tunnel, stating as required by St. 1897, c. 500, § 17, that "the whole amount of the rentals for the use of and tolls for persons passing through the East Boston tunnel is pledged for the payment of the principal and interest of this loan," the tolls pledged by the contract include the payments made by those who leave the tunnel without passing through the whole of it, and the Legislature has not the power to abolish the toll of one cent required from persons travelling in the tunnel between Scollay Square and Atlantic Avenue.

A certified copy of the following preamble and order adopted by the General Court was transmitted to the Justices of the Supreme Judicial Court on April 20, 1906:

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Whereas, by the provisions of chapter 548 of the acts of the year 1894 and of chapter 500 of the acts of the year 1897 the Boston Transit Commission was commanded to construct for the city of Boston a tunnel or tunnels of sufficient size for two railway tracks, with approaches, entrances, sidings, stations and connections therefor, from a point in Boston, proper for a suitable connection with the then existing subway or subways, to a point at or near Maverick Square in East Boston, said act providing, among other things, that upon completion of said tunnel or tunnels said commission should execute a lease thereof in writing to the Boston Elevated Railway Company for the term of twenty-five years at an annual rental equal to three-eighths of one per cent of the gross receipts for each year of all lines owned, leased or operated by said corporation; and further providing that said city should collect from each person passing through said tunnel in either direction a toll of one cent, that under certain conditions set forth in the act the railroad commissioners might on petition of ten citizens reduce or abolish said tolls, and that the whole amount of said tolls and of said rentals should be pledged to meet the principal and interest of the bonds issued to pay for the construction of said tunnel or tunnels, this pledge to be expressed on the face of such bonds as one of the terms thereof; and

Whereas, said tunnel has been constructed in accordance with the provisions of said chapter 548 of the acts of the year 1894 and of said chapter 500 of the acts of the year 1897 and the amendments thereof contained in chapter 534 of the acts of the year 1902; and

Whereas, bonds have been issued and sold by the city of Boston to the amount of over three million dollars in accordance with the provisions of said chapter 500 of the acts of the year 1897, each of said bonds having stamped upon it the following words: "East Boston Tunnel. The whole amount of the rentals for the use of and tolls for persons passing through the East Boston tunnel is pledged for the payment of the principal and interest of this loan;" and

Whereas, said tunnel has been leased by the Boston Transit Commission in accordance with the terms of said acts; and

Whereas, the interest and sinking-fund requirements of said

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bonds for the fiscal year ending February 1, 1906, were $142,815.09, while the amount received for rentals during said fiscal year was $35,398.22, the gross amount received from tolls $85,551.20, from which was deducted the cost of collecting the same, $13,635.39, leaving the net receipts from tolls $71,915.81, making receipts from both tolls and rentals for the fiscal year $107,314.03; and

Whereas, a bill has been presented to the Legislature, being Senate Bill No. 45, providing that no tolls or cash fares beyond the regular fare of five cents shall be demanded or collected by the city of Boston or by the Boston Elevated Railway Company from persons passing in either direction through the East Boston tunnel constructed under the provisions of chapter 548 of the acts of the year 1894 and of chapter 500 of the acts of the year 1897 and acts in amendment thereof; and

Whereas, the said tunnel has its westerly terminus in Scollay Square and there is a station between Scollay Square and Atlantic Avenue and one at Atlantic Avenue at which passengers may take and leave cars of the Boston Elevated Railway Company passing through the tunnel on the way to or from East Boston and the said toll of one cent is collected from every person who passes through any part of the tunnel between its two termini, however short the distance, and the city of Boston deducts from the gross amount of tolls the cost of collecting the same; and

Whereas, by section 19 of chapter 534 of the acts of the year 1902 it was provided that the city of Boston "shall have, hold and enjoy in its private or proprietary capacity, for its own property, the existing subway, the East Boston tunnel, the Cambridge Street subway and the tunnel and subway built under this act, and all rents, tolls, income and profits from all contracts heretofore or hereafter entered into for the use of said subways or tunnels or any part thereof, and the same shall never be taken by the Commonwealth except on payment of just compensation;"

Be it ordered, that a certified copy of this order and preamble be transmitted by the clerk of the Senate and the clerk of the House of Representatives, to the Justices of the Supreme Judicial Court and that the opinion of the said justices be

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required by the Senate and the House of Representatives upon the following important questions of law:—

First: Considering the provisions of chapter 548 of the acts of the year 1894 and of chapter 500 of the acts of the year 1897, of chapter 534 of the acts of the year 1902, and the facts set forth in the preamble, is it within the constitutional power of the Legislature to abolish the tolls as provided in Senate Bill No. 45?

Second: Is it within the constitutional power of the Legislature to pass any bill abolishing the toll of one cent provided for by said acts?

Third: Is it lawful for the city of Boston to deduct the cost of collection from the gross amount of tolls collected?

Fourth: If all tolls cannot be abolished, is it within the constitutional power of the Legislature to pass a bill abolishing the toll of one cent exacted from persons travelling between Scollay Square and Atlantic Avenue?

On April 30, 1906, the Justices returned the following answer:

To the Honorable the Senate and the House of Representatives of the Commonwealth of Massachusetts:

We, the Justices of the Supreme Judicial Court, have received the order, a copy of which is hereto annexed, requesting our opinion upon four important questions of law, and we respectfully submit the following opinion.

Section 10 of article 1 of the Constitution of the United States contains this provision: "No state shall . . . pass any . . . *ex post facto* law, or law impairing the obligation of contracts, or grant any title of nobility," etc. Upon each of the bonds referred to, issued by the city of Boston in accordance with the provisions of the St. of 1897, c. 500, are stamped the following words: "East Boston Tunnel. The whole amount of the rentals for the use of and tolls for persons passing through the East Boston tunnel is pledged for the payment of the principal and interest of this loan." This statement, which was thus made a part of the contract on the faith of which purchasers have bought the bonds, was authorized and required by the statute. The fact that lies behind the state-

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ment, namely, that the rentals and tolls are actually set apart and pledged as security for this payment, is also a requirement of the statute. We have therefore a contract which rests not only upon the agreement of the city, made for a valuable consideration, but upon the deliberate action and solemnly pledged faith of the Commonwealth. The tolls referred to are the tolls then established by law and they cannot be diminished without reducing the security to which the owners of the bonds are entitled. It is plain that the sale of bonds, carrying on their face this stipulation, creates a contract with each purchaser which it is not in the power of the Legislature to impair. We make this answer to the first and second questions.

The third question, "Is it lawful for the city of Boston to deduct the cost of collection from the gross amount of tolls collected," while less important, is more difficult than either of the first two. The words "whole amount of the . . . tolls" are broad enough to include the entire sums prescribed by statute and collected as tolls, without diminution for the cost of collection. But the law contemplates collection of these tolls by the Boston Elevated Railway Company, acting as the city's agent, and suggests payment of compensation for collecting. St. 1897, c. 500, § 17. We think that the purpose and intent of the statute are accomplished if the city retains as security the amount received for the tolls, less a necessary and reasonable allowance to the railway company for the collection of them. This is in accordance with the opinion of the Justices upon a similar question, as to whether the annual payment of one per cent of its income, which the Western Railroad Corporation was required by St. 1838, c. 9, § 3, to make to a sinking fund, was payable from its gross income or its net income. It was held that the percentage was to be reckoned on the net income. *Opinion of the Justices*, 5 Met. 596.

The fourth question refers to the fact that there are two stations on the tunnel, besides the stations at the termini, and some passengers who ride in the tunnel choose to leave the car without passing through the whole length of the tunnel. It may be that the construction of these intermediate stations

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was not anticipated when the statute was enacted, and that it was not supposed that passengers would be able to pass through any part of the tunnel without going from one end of it to the other. However that may be, we are of opinion that the application of the statute, to the tunnel as it is, requires us to hold that one who takes a car and rides through a part of it, and then voluntarily leaves the car at an intermediate station, passes through the tunnel, within the meaning of the statute, and is liable to pay the prescribed toll. With any other construction of the statute it would be difficult, if not impossible, to make a distinction between different parts of the tunnel, or to say that tolls could be collected of any passenger who did not ride through the entire tunnel from end to end.

If the term "tolls" includes payments by those who leave the tunnel without passing through the whole of it, these are pledged by the contract, as well as the payments for rides through its entire length, and it is beyond the constitutional power of the Legislature to affect the rights of bondholders to this part of their security.

MARCUS P. KNOWLTON.
JAMES M. MORTON.
JOHN LATHROP.
JOHN W. HAMMOND.
WILLIAM CALEB LORING.
HENRY K. BRALEY.
HENRY N. SHELDON.

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Opinion of the Justices to the Senate.

Under the Constitution of the Commonwealth, c. 3, art. 2, it is not the duty of the justices of this court to answer a question from a branch of the Legislature upon an important question of law which is asked merely to obtain general information without reference to any proposed legislation.

A statute attempting to equalize the bounties paid to soldiers in the Civil War by giving to soldiers who served in that war under a contract of enlistment further compensation, because other soldiers enlisting in the same war at other times and places made more advantageous contracts, would be unconstitutional as authorizing taxation for a private purpose. Such a statute would not be changed in character, and so would not be made constitutional, by inserting in it recitals that the payments were authorized in recognition of valuable services with a view to the promotion of loyalty and patriotism.

Whether this Commonwealth might not grant pensions in recognition of the services of its citizens in the army of the United States, *quære*.

A statute providing for the reward of distinguished public services, with a view to the promotion of loyalty and patriotism, by the payment of money, the erection of statues, or the bestowal of medals, decorations or other badges of honor would be constitutional.

The following order was passed by the Senate on April 20, 1906, and on April 24, 1906, was transmitted to the Justices of the Supreme Judicial Court:

Ordered, that the opinion of the Justices of the Supreme Judicial Court be required by the Senate upon the following important question of law: Is it a constitutional exercise of the legislative power of the General Court to enact a law providing for an appropriation of money from the treasury of the Commonwealth for the purpose of recognition of valuable services of persons who served to the credit of Massachusetts during the Civil War and who were honorably discharged from such service, such appropriation to be used either for the payment of sums of money to such persons, or for medals or other evidences of appreciation of their services, if in the opinion of the General Court the public good will be served, and loyalty and patriotism promoted, by such recognition?

On May 2, 1906, the Justices returned the following answer:

To the Honorable the Senate of the Commonwealth of Massachusetts.

The Justices of the Supreme Judicial Court have received the order of the Honorable Senate requiring their opinion upon the

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following important question of law: "Is it a constitutional exercise of the legislative power of the General Court to enact a law providing for an appropriation of money from the treasury of the Commonwealth for the purpose of recognition of valuable services of persons who served to the credit of Massachusetts during the Civil War and who were honorably discharged from such service, such appropriation to be used either for the payment of sums of money to such persons, or for medals or other evidences of appreciation of their services, if in the opinion of the General Court the public good will be served, and loyalty and patriotism promoted, by such recognition?"

We are somewhat embarrassed by the form of the question and the mode of its presentation. The object of the constitutional provision that the Justices may be required to give opinions to the executive and legislative branches of the government, on important questions of law, is to enable these departments to have such assistance as may come from these opinions, in the performance of their official duties in regard to matters then pending. *Opinion of the Justices*, 186 Mass. 603. As these opinions are necessarily given without the aid of arguments of counsel, and as they may affect the rights of parties who have had no opportunity of being heard, even though they are of no binding force against litigants in the courts, they ought not to be given, except when needed in the consideration of an important matter of state that calls for official action. It is a usual practice, in presenting such questions, to direct attention to the particular subject under consideration in reference to which the opinion is desired. This practice is convenient and helpful, first, as showing expressly the existence of an occasion which justifies the Justices in giving their opinions, and, secondly, as enabling the Justices to understand the questions, in their practical application to the subject to which they relate. The most difficult questions of law often arise in the application of legal principles to concrete cases, rather than in the determination and statement of the principles themselves.

The question now presented does not point to any particular kind of legislative action as under consideration by the General Court. It is in the most general form, looking apparently to the subject of appropriating money from the treasury of the Com-

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monwealth for any conceivable mode of recognition of services of honorably discharged soldiers, who served to the credit of Massachusetts in the Civil War. The inquiry relates to all such soldiers, and to recognition of their services by the payment of money, the bestowal of medals, or by other evidences of appreciation. If this appeared to be a question asked merely to obtain general information, without reference to any proposed legislation, it would be our duty to decline to answer it; but, notwithstanding the broad field traversed by it, we are inclined to assume that it has reference to some special subject which is before the Honorable Senate for consideration. We do this the more confidently because it has been stated publicly that a bill has been introduced in the Legislature, looking to the payment to persons who enlisted to the credit of Massachusetts as soldiers in the Civil War, of sums of money, equivalent to the differences between the bounties paid them on their enlistment and larger bounties received by other soldiers who enlisted at other times and in other places. We have no information of the form or language of this bill, if there is such a bill; but we think it proper to consider the question in its possible application to such a measure.

The general principle that the people can be taxed, in this Commonwealth, only for public purposes is established by many decisions. *Lowell* v. *Boston*, 111 Mass. 454. *Opinion of the Justices*, 155 Mass. 598, and cases cited. *Opinion of the Justices*, 182 Mass. 605. *Opinion of the Justices*, 186 Mass. 603. The power of the Legislature to appropriate money from the treasury of the Commonwealth, for any other than a public purpose, is no greater than its power to authorize a city or town to make a like appropriation. It was held by our predecessors in this court, more than twenty years ago, when the events of the Civil War and the successful efforts of Massachusetts to fill its quota were comparatively fresh in their memories, that a statute, authorizing the town of Acton to pay bounties to soldiers who enlisted in a certain regiment in 1864, and were credited to the town, was unconstitutional. This was a unanimous decision, made with deliberation, after hearing arguments of counsel. With the changes that have since been made from time to time in the membership of the court, it never has been overruled or

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modified. It repeatedly has been referred to with approval in later decisions, and in the *Opinion of the Justices*, 186 Mass. 603, it was expressly reaffirmed. Notwithstanding an adverse dictum in one of the opinions, we do not understand that these decisions rest on the ground that the State cannot grant pensions as a reward for meritorious services, or to relieve those suffering from disease, wounds, or other disability, as a result of their exposure in war; but we understand them to rest on the ground that soldiers who made a contract for enlistment for such compensation, with or without a bounty, as was agreed to and deemed satisfactory, are bound by their contract, and that the making of more advantageous contracts by other persons enlisting at other times and in other places, and perhaps under very different conditions, does not give the first mentioned soldiers a standing to claim an additional sum beyond that received. The decisions are that payments, made to equalize the amounts accepted by them as inducements to the making of their contract with larger amounts received by other soldiers, would be mere gratuities, founded on no legal consideration, and not proper to be provided by compulsory taxation. Such payments are not founded on any difference in the nature of the services or in the merit of the soldier. They depend upon the amount received under the contract for military service, an arbitrary distinction which has no reference to the grounds on which pensions may be granted, or statues erected. Accordingly such statutes have been held unconstitutional. If it were possible to take a different view of this subject, we feel bound by decisions which have been the law of the Commonwealth for many years, and we find nothing to justify us in reversing them.

It is a familiar rule of law that a statute is to be interpreted in reference to its purpose and effect, as shown by its application to the subject to which it relates. If a bill should appear, by its substantive provisions, to be a measure for the equalization of bounties among the soldiers of Massachusetts who served in the Civil War, or for the payment of moneys to make the result of their contracts of enlistment more favorable to certain soldiers because the contracts of other soldiers were made on better terms, it would be unconstitutional, even if it contained recitals that the payments would be made in recognition of

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valuable services, with a view to the promotion of loyalty and patriotism.

We cannot undertake to answer the question of the Honorable Senate in reference to every conceivable application of it. We infer that our opinion is desired in regard to the right of the State to give sums of money or other like rewards, in recognition of valuable military service. The power to reward distinguished public service, with a view to the promotion of loyalty and patriotism, has long been regarded as one of the attributes of organized government. *Opinion of the Justices*, 175 Mass. 599. It is exercised by the government of the United States and by other nations. The doubt which arises as to the rights of the states of this country in this respect grows out of our dual system of government. The federal government alone has power to declare war, and our soldiers in the Civil War were in the military service of the United States. So far as we have been informed, since the adoption of the federal constitution, none of the states has assumed to grant pensions to soldiers for service in the armies of the United States. For such purposes it is generally understood that our government is the federal government; but for many purposes, and in a certain field, Massachusetts is a sovereign state, maintaining an independent government. In another relation it is a member of the family of states, and a constituent force in the national organization. We are inclined to the opinion that, in this relation, it is so identified with the nation that it may treat the services of its citizens, who serve to its credit in the armies of the United States, as entitled to recognition from Massachusetts as a sovereign state. Each of us is a citizen of Massachusetts as well as a citizen of the United States. Massachusetts may honor her citizens for what they do for the national government, in those fields to which she sends them as her representatives under the constitution and laws of the United States.

The question asked by the Honorable Senate should be answered in the affirmative, so far as to say that the general principle referred to may have legitimate application to services such as generally have been treated as deserving recognition by the payment of sums of money, the erection of statues, or the bestowal of medals, decorations or other badges of honor. In

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the application of the principle the question ordinarily will be, whether the benefit is conferred as an appropriate recognition of distinguished and exceptional service, such that the dignity of the State will be enhanced and the loyalty and patriotism of the people will be promoted by making it a subject of governmental action.

MARCUS P. KNOWLTON.
JAMES M. MORTON.
JOHN LATHROP.
JOHN W. HAMMOND.
WILLIAM CALEB LORING.
HENRY K. BRALEY.
HENRY N. SHELDON.

OPINION OF THE JUSTICES TO THE GOVERNOR AND COUNCIL.

Under the Constitution of the Commonwealth, where the Governor is given power to act "by and with the advice of the council" or "by and with the advice and consent of the council," the responsibility rests primarily on the Governor to determine whether any action is called for and what action, if any, is desirable, and the approval and concurrence of the Council are required only to complete an affirmative act.

Under Const. Mass. c. 2, § 1, art. 8, the Governor before denying a petition to pardon a person convicted of a crime or to commute his sentence is not required to submit the petition to the Council.

The commutation of a sentence is a pardon upon condition that the convict voluntarily submits to a lighter punishment.

AT a meeting of the Governor and Council held on May 25, 1906, the following order was passed, and on the same day was transmitted to the Justices of the Supreme Judicial Court:

Ordered, that the opinion of the Honorable Justices of the Supreme Judicial Court be requested in answer to the following question:

Is the Governor of the Commonwealth, upon presentation to him of a petition for the pardon of a person convicted of a crime and duly sentenced therefor, or for commutation of the sentence so imposed upon such person, required as a matter of law to

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refer such petition to the Executive Council or to submit the same for the consideration of said Council?

On May 29, 1906, the Justices returned the following answer:

To his Excellency the Governor and the Honorable Council of the Commonwealth of Massachusetts:

The Justices of the Supreme Judicial Court have received from his Excellency the Governor and the Honorable Council, their order, as follows:

"Ordered, that the opinion of the Honorable Justices of the Supreme Judicial Court be requested in answer to the following question:

"Is the Governor of the Commonwealth, upon presentation to him of a petition for the pardon of a person convicted of a crime and duly sentenced therefor, or for commutation of the sentence so imposed upon such person, required as a matter of law to refer such petition to the Executive Council or to submit the same for the consideration of said Council?"

In reply to the question we respectfully submit the following opinion:

The provision of the Constitution under which this question arises is c. 2, § 1, art. 8 as follows: "The power of pardoning offences, except such as persons may be convicted of before the senate by an impeachment of the house, shall be in the governor, by and with the advice of council; but no charter of pardon, granted by the governor, with advice of the council before conviction, shall avail the party pleading the same, notwithstanding any general or particular expressions contained therein, descriptive of the offence or offences intended to be pardoned."

Chapter 2, § 3, art. 1 of the Constitution is in these words: "There shall be a council for advising the governor in the executive part of the government, to consist of nine persons [now changed by amendment to eight] besides the lieutenant-governor, whom the governor, for the time being, shall have full power and authority, from time to time, at his discretion, to assemble and call together; and the governor, with the said councillors, or five of them at least, shall and may, from time to time, hold and keep a council, for the ordering and directing

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the affairs of the commonwealth, according to the laws of the land."

The Constitution recognizes two kinds of executive business which may come before the Council: one, that which is to be done by the Governor and Council acting together as an executive board, and the other, business to be done by the Governor, acting under the responsibility of his office as supreme executive magistrate, by and with the advice and consent of the Council. In the transaction of other kinds of executive business, doubtless the Governor may take the advice of the Council or not, as he chooses. We find examples of the first kind in numerous express provisions, some of which are as follows: Chapter 1, § 2, art. 3 declares that "the governor with five of the council, for the time being, shall, as soon as may be, examine the returned copies of such records," etc. Chapter 2, § 1, art. 4 has this language: "The governor shall have authority, from time to time, at his discretion, to assemble and call together the councillors of this commonwealth for the time being; and the governor with the said councillors, or five of them at least, shall, and may, from time to time, hold and keep a council, for the ordering and directing the affairs of the commonwealth, agreeably to the constitution and the laws of the land." In article twelve of the Amendments, now superseded, it is provided that "the governor and council shall ascertain and determine . . . the number of representatives, which each city, town and representative district is entitled to elect," etc. Under article thirteen of the Amendments, "the governor and council shall assign the number of senators to be chosen in each district, according to the number of inhabitants in the same." There is a similar provision for the apportionment of the number of representatives among the cities, towns and representative districts. In all these cases the Governor and Council are to act together as an executive body, and the Governor cannot lawfully act alone.

Examples of the second class, showing executive duties which primarily rest upon the Governor alone, the performance of which, when they result in affirmative action, requires the advice and consent of the Council in approval of the action, are found in different parts of the Constitution. One is in regard to the exercise of the power of pardon under the article first

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quoted. Another is in the next article, as follows: "All judicial officers . . . shall be nominated and appointed by the governor, by and with the advice and consent of the council; and every such nomination shall be made by the governor, and made at least seven days prior to such appointment." So, under articles 5 and 6 of the same section, the Governor with the advice of Council may adjourn or prorogue the General Court to any time the two houses desire; or, in cases of disagreement between the two houses, to such time, not exceeding ninety days, "as he shall determine the public good shall require." There is a like provision in article 11 of the same section, in regard to signing warrants on which money is to be paid out of the treasury of the Commonwealth, and in article 10 in regard to the appointment of officers of the continental army. Action of the Governor with the advice and consent of the Council is also provided for in articles four and twenty-five of the Amendments to the Constitution.

Chapter 2, § 3, art. 5 is as follows: "The resolutions and advice of the council shall be recorded in a register, and signed by the members present; and this record may be called for at any time by either house of the legislature; and any member of the council may insert his opinion, contrary to the resolution of the majority."

As to this class of cases, where the Constitution declares that the power to act is in the Governor, or that the act may be done by the Governor, "by and with the advice of council," or "by and with the advice and consent of the council," we are of opinion that the responsibility rests primarily upon the Governor to determine, as the supreme executive magistrate, whether any action is called for, and what action, if any, is desirable; and that the provision for advice of the Council is a requirement that their approval and concurrence shall accompany the affirmative act and enter into it before it becomes complete and effective. We do not think that these different phrases, used in different parts of the Constitution, namely, "by and with the advice of council," "by and with the advice and consent of the council," "with the advice and consent of the council," "with advice of council," and "with advice of the council," differ at all in legal effect. They all recognize the fact that the act, first of all, and after-

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wards for all time, is to be the act of the Governor. The only connection that the council can have with it is advisory. Whether the Governor takes advice or not, his conclusion must rest finally upon his own judgment. Inasmuch as the responsibility for his determination, with or without advice, must rest upon him, both in the beginning and forever after, the natural course of proceeding would seem to be that he should seek such aid as he might desire from any proper source, and not be obliged to ask advice, in the first instance, from an official body whose opinion could never relieve him from the duty of deciding.

Look at the appointment of judicial officers. They are to be "nominated and appointed by the governor, by and with the advice and consent of the council." The requirement that the nomination shall be at least seven days prior to the appointment secures for the Council time to consider whether to give their advice and consent. It cannot have been intended that the Governor, before determining upon a person to be appointed, should be obliged to take the advice of the Council; but plainly it was intended that before an act of appointment can become complete, the Council shall approve of it, and take affirmative action which fairly may be called advising it, as well as consenting to it. The words "advice and consent" are used together to denote a kind of participation. But they imply participation only in the particular affirmative act of the Governor, referred to in the provision. Unless the Governor first determines upon the act, there is no occasion for their participation by way of advice or consent.

So, as to pardons, "the power of pardoning offences . . . shall be in the governor." But this power can be exercised only "by and with the advice of council." If the Governor does not think it his duty to exercise it, he has no occasion to take the advice of the council. If he should consult them and they should unanimously advise him to pardon, it would not be his duty to act unless he himself should think that he ought to exercise his power. It was not intended that he should be obliged to bring before the Council an application for pardon when he was plainly of opinion that no pardon should be granted. Nothing could ever be gained by asking the Council to give advice under such conditions. The requirement that their advice shall always be

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made a matter of record, open to either branch of the Legislature, does not indicate that they should necessarily be called upon, at the outset, to advise the Governor as to whom he should appoint to office, or what convicts he should pardon.

Of course, upon such questions, as well as upon others, the Governor may seek information and advice from any proper source. There may be cases in which an investigation by a committee of the Council may be suggested by the Governor, as a convenient mode of ascertaining facts. But we think it plain that, in determining in the first instance whether he ought to attempt to exercise the power of pardon, the Governor may choose his own method of reaching a conclusion, without submitting the matter to the Council.

That part of the question which relates to a petition for a commutation of a sentence is covered by what we have already said. The commutation of a sentence is a pardon upon condition that the convict voluntarily submits to a lighter punishment.

Mr. Justice Loring is absent from the Commonwealth, and has had no opportunity to consider the question.

MARCUS P. KNOWLTON.
JAMES M. MORTON.
JOHN LATHROP.
JOHN W. HAMMOND.
HENRY K. BRALEY.
HENRY N. SHELDON.

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4. A broker, who undertakes to find a purchaser for a note and mortgage made by a cemetery association, is not entitled to a commission for procuring a person who agrees to take the note and mortgage if the title created by the mortgage is satisfactory to his conveyancer and afterwards refuses to take them on such title not being satisfactory to his conveyancer because in the conveyancer's opinion a perfect title cannot be acquired by foreclosure against a cemetery association, and it does not matter whether the conveyancer's opinion is correct or not. *Wiggin* v. *Holbrook*, 157.

5. In an action by real estate brokers for a commission on a sale of real estate of the defendant the evidence, which was reported at great length, showed that in October, 1901, and February, 1902, the plaintiffs offered the property to the purchaser for $1,000,000 in cash, and he refused the offer, and that the defendant afterwards called in another broker who in November, 1902, concluded a sale of the property to the purchaser for $1,086,228, to be paid by assuming mortgages upon the property and to be placed upon it by the defendant amounting to $630,000, by $425,000 in securities to be taken at their face value, and by $31,228 in cash. *Held*, that on the evidence reported to the court it was not shown that the plaintiffs had anything to do with the trade which finally was made, or that they were in any way its efficient and predominating cause, and that the jury rightly were ordered to return a verdict for the defendant. *Snow* v. *Williams*, 235.

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6. In an action against a corporation manufacturing sewing machines for an assault on the plaintiff alleged to have been committed by a servant of the defendant in taking from her a sewing machine for non-performance of the conditions of a contract of conditional sale, there was evidence that one S. was employed by the defendant to take machines on failure of the purchasers to pay for them in accordance with the conditions of their contracts, that his instructions were to take the machine if he could get it peaceably, and, if not, to report the matter, whereupon his superior would replevy the machine, that he had men under him to do business and was supposed to handle these men, that he employed one A. to assist him in removing the machine in question, having made a sham sale from the defendant to A. for the purpose of giving him an apparent title, and that A. in attempting to remove the machine was resisted by the plaintiff and committed the assault. *Held*, that a verdict for the plaintiff was justified, the defendant being liable for the acts of A. in the course of his employment, even if A. had been told not to use force. *Grant* v. *Singer Manufacturing Co.* 489.

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verdict for the plaintiff may be supported on the ground that the jury adopted the defendant's theory of the assault and found that the servant used more force than was necessary for his lawful purpose. *Collins* v. *Wise*, 206.

2. In an action for assault and battery in which the defendant pleaded self defence in justification, it appeared that the plaintiff and the defendant were fishermen, and that a quarrel arose between them when each was in his dory, that the plaintiff rowed toward the defendant and threw three or four oars at him in harpoon fashion, one after another, whereupon the defendant, who easily could have pulled away, tried to pull the plaintiff on board his boat, and, failing in that, jumped into the plaintiff's boat, threw the plaintiff face down over one of the thwarts, and, holding him in that position by the hair of his head, "punched" him eight or nine times as hard as he could, saying, on cross-examination, that he meant business when the plaintiff offered to fight and that he shifted hands while striking him. *Held*, that the defendant exceeded the degree of force justified by the occasion, and that the jury properly were instructed that the defendant was liable for the assault. *Monize* v. *Begaso*, 87.

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In such case banker does not lose his title by indorsing bill of lading and permitting delivery of goods to importer in exchange for trust receipt acknowledging title of banker, see BILL OF LADING.

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Composition.

1. By an express provision of the bankruptcy act of 1898, § 70 f, upon the termination of proceedings by the confirmation of a composition offered by the bankrupt the title to his property revests in him. *Alexander* v. *Grover*, 462.

Discharge.

2. In the provisions of the bankruptcy act of 1898, § 17, cl. 2, excepting from release by a discharge in bankruptcy liabilities "for wilful and malicious injuries to the person or property of another" the words "wilful and malicious" have their ordinary legal meaning describing an intentional disregard of duty. *McChristal* v. *Clisbee*, 120.

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3. An execution issued on a judgment entered upon a general verdict, which found the defendant liable on a declaration containing a count for assault and battery, a count for false imprisonment and a count for malicious prosecution, is not barred by a discharge under the bankruptcy act of 1898, as all of these liabilities are excepted from the operation of a discharge in bankruptcy by § 17, cl. 2, of the act. *McChristal* v. *Clisbee*, 120.

4. If a debtor in the employ of a city gives to his creditor as security an order on the city to pay to the creditor the wages due him for a future month, and afterwards before the wages are due files a petition in bankruptcy and finally obtains a discharge, the discharge is a bar not only to an action for the debt but also to an action against him as drawer of the order, whether the city is liable to the creditor on the order or not. *Mitchell* v. *Leland*, 258.

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Betterments assessed under St. 1902, c. 527, for work done by city of Boston in 1895 in extending Columbus Avenue not breach of covenant against incumbrances in deed made in 1897, see DEED, 3.

BILL OF LADING.

A banker, who has acquired the title to merchandise imported from a foreign country by advancing the purchase money under a letter of credit on drafts accompanied by bills of lading of the merchandise to his order, does not lose this title by indorsing the bills of lading to the importer and permitting the goods to be delivered to him under a trust receipt by which the importer agrees to hold the merchandise in trust or on storage as the property of the banker with liberty to sell and deliver the merchandise to a certain firm on account of the banker and to deliver to the banker the proceeds of any sale of the merchandise, to be applied by the banker in the first place to the payment of any drafts or acceptances under the letter of credit, and secondly to the payment of any other indebtedness of the importer to the banker. *Moors* v. *Bird*, 400.

BILLS AND NOTES.

Consideration.

1. A note given in renewal of previous notes which were without consideration is without consideration. *Widger* v. *Baxter*, 130.

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2. A note signed by a husband and wife given to a former creditor of the husband, whose claim has been barred by a discharge of the husband in insolvency, merely as an acknowledgment of or security for an unenforceable moral obligation of the husband, is without consideration as against the wife. *Widger* v. *Baxter*, 130.
3. The note of a wife given to a creditor of her husband as security for a pre-existing debt of the husband is not binding without a new consideration. *Ibid.*
4. A promise to end proceedings, in which a defendant has been arrested on an execution under R. L. c. 168, § 1, cl. 3, on the ground that he is an attorney at law and that the debt was for money collected by him for the plaintiff which he unreasonably neglected to pay to the plaintiff, is a good consideration for a promissory note signed by the defendant as maker and by another as surety, and the consideration is good against the surety as well as against the maker. *Fay* v. *Hunt*, 378.

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5. A defendant sued on a promissory note cannot show, in the absence of fraud, that he did not know the contents of the note when he signed it and thought that another person was the payee. *Fay* v. *Hunt*, 378.

Payment by Indorser in Blank before Delivery.

6. Since the enactment of St. 1898, c. 533, as well as before, one who has placed his signature on the back of a promissory note payable to the order of a third person, in blank before delivery, if he pays the note extinguishes it and cannot negotiate it. Section 121 of that statute, now R. L. c. 73, § 138, has no application to such a case, giving a remedy only to subsequent indorsers. *Quimby* v. *Varnum*, 211.

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2. Under R. L. c. 75, §§ 91–98, if a trade or employment is designated by a general order of the board of health of a city or town as offensive, before such an order can be enforced it must be served upon the occupant or person having charge of the premises where such trade or employment is exercised, and a notice by publication in a newspaper which also is sent by mail to the persons against whom the proceedings are taken is insufficient. *Ibid.*
3. An order of the board of health of a town prohibiting the exercise of the trade or employment of excavating clay for the purpose of manufacturing bricks within the limits of the town, except upon the premises "now owned and operated" by a certain brick company, without a written permit from the board of health, not to be granted unless the applicant shall furnish a bond with good and sufficient sureties conditioned upon the observance of the terms of the permit, and upon the filling within a reasonable time to be fixed by the board with materials and in a manner satisfactory to the board of any excavations made by the obligor, is unreasonable and void, and cannot be enforced against the brick company the continued operation of whose business on its old premises is excepted. *Ibid.*

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2. In the stipulation on the face of the bonds issued to pay for the construction of the East Boston tunnel, stating as required by St. 1897, c. 500, § 17, that "the whole amount of the rentals for the use of and tolls for persons passing through the East Boston tunnel is pledged for the payment of the principal and interest of this loan," the words "the whole amount of the tolls" mean the net amount, and the city of Boston may deduct a reasonable charge for the cost of collection. *Opinion of the Justices*, 605.

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commissioners have established a building line to seventy feet does not apply to the buildings on a square where such a building line has not been established. *Williams* v. *Boston*, 541.

CARRIER.

A corporation supplying messenger boys to be used in ordinary messenger service and controlled by those calling for them is not a common carrier, and performs its duty toward its customers by exercising ordinary care in the selection and employment of suitable persons as messengers. *Haskell* v. *Boston District Messenger Co.* 189.

City of Boston in operating East Boston ferry is common carrier of passengers, see MUNICIPAL CORPORATIONS, 3.

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CHARITY.

A gift to a town for a library provided that the details of the management and regulation of the fund should be left to the trustees, and gave the town authority by a two thirds vote of its legal voters to select the site for the library building and to fix its cost. The trustees, having the fund in their hands, made a contract for the erection of a library building at a cost which was in excess of their original authority and reported this contract and certain payments on account of it to the town, which by a two thirds vote at an annual town meeting ratified their acts. Upon a bill by the trustees for instructions as to paying to the contractor the balance called for by the contract the court, in holding that the acts of the trustees had become binding on the town by ratification, also held that, although the details of management and regulation, except as to the site and cost of the library building, belonged to the trustees, yet the fund was the property of the town and should be in its custody, and directed the trustees to deliver it to the town treasurer or to such other officer as the town might direct; but, inasmuch as the trustees had made the contract in good faith, ordered that the fund when paid over should be charged with a trust in their favor to the extent necessary to indemnify them against any loss by reason of personal liability to the contractor. *Nelson* v. *Inhabitants of Georgetown*, 225.

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Commutation of sentence is conditional pardon, see CONSTITUTIONAL LAW, 4.

Governor not required to submit to Council petition to commute sentence before denying petition, see CONSTITUTIONAL LAW, 3.

COMPOSITION WITH CREDITORS.

Effect of confirmation of a composition by a bankrupt with his creditors under the bankruptcy act of 1898 is to cause the bankrupt's property to revest in him, see *Alexander* v. *Grover*, 462.

Account by assignee in insolvency of assets remaining in his hands after discharge of debtor by terms of composition with creditors, see INSOLVENCY, 2.

CONSTITUTIONAL LAW.

Unconstitutionality of Part of Statute.

Whether unconstitutionality of provisions of R. L. c. 65, §§ 15, 16, discriminating against sale by hawkers and pedlers of articles of the growth and production of foreign countries affects validity of other provisions of the statute, *quære*, see *post*, 11.

Opinions of the Justices.

1. Under the constitution of the Commonwealth, c. 3, art. 2, it is not the duty of the justices of this court to answer a question from a branch of the Legislature upon an important question of law which is asked merely to obtain general information without reference to any proposed legislation. *Opinion of the Justices*, 611.

Governor and Council.

2. Under the Constitution of the Commonwealth, where the Governor is given power to act "by and with the advice of the council" or "by and with the advice and consent of the council," the responsibility rests primarily on the Governor to determine whether any action is called for and what action, if any, is desirable, and the approval and concurrence of the Council are required only to complete an affirmative act. *Opinion of the Justices*, 616.

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Pardoning Power.

8. Under Const. Mass. c. 2, § 1, art. 8, the Governor before denying a petition to pardon a person convicted of a crime or to commute his sentence is not required to submit the petition to the Council. *Opinion of the Justices*, 616.
4. The commutation of a sentence is a pardon upon condition that the convict voluntarily submits to a lighter punishment. *Ibid.*

Police Power.

Attempt to regulate business of selling or giving trading stamps in connection with sale of articles not proper exercise of police power, see *post*, 5.

Excise Tax.

5. St. 1904, c. 403, attempting to impose an excise tax on the business of selling or giving trading stamps or similar devices in connection with the sale of articles, is unconstitutional and void, the right to transact business in this manner not being a commodity within the meaning of the word "commodities" in Const. Mass. c. 1, § 1, art. 4, and the restriction of such a lawful business not being a proper exercise of the police power. *O'Keeffe* v. *City of Somerville*, 110.

Taxation for Private Purpose.

6. A statute attempting to equalize the bounties paid to soldiers in the Civil War by giving to soldiers who served in that war under a contract of enlistment further compensation, because other soldiers enlisting in the same war at other times and places made more advantageous contracts, would be unconstitutional as authorizing taxation for a private purpose. Such a statute would not be changed in character, and so would not be made constitutional, by inserting in it recitals that the payments were authorized in recognition of valuable services with a view to the promotion of loyalty and patriotism. *Opinion of the Justices*, 611.

Promotion of Loyalty and Patriotism.

7. A statute providing for the reward of distinguished public services, with a view to the promotion of loyalty and patriotism, by the payment of money, the erection of statues, or the bestowal of medals, decorations or other badges of honor would be constitutional. *Opinion of the Justices*, 611.

Pensions.

8. Whether this Commonwealth might not grant pensions in recognition of the services of its citizens in the army of the United States, *quære*. *Opinion of the Justices*, 611.

Obligation of Contracts.

9. Bonds were issued by the city of Boston under St. 1897, c. 500, on each of which under the requirement of that statute were stamped the following words: "East Boston Tunnel. The whole amount of the rentals for the use of and tolls for persons passing through the East Boston tunnel is pledged for the payment of the principal and interest of this loan." The

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statute provided that the city of Boston should collect from each person passing through the tunnel in either direction a toll of one cent, which under certain conditions might be reduced or abolished by the railroad commissioners on petition of ten citizens. *Held*, that the sale of the bonds with the above stipulation expressed on their face by direction of the Legislature created a contract with the purchaser of each bond which it was not in the power of the Legislature to impair; that the tolls referred to were those then established by law and that they could not be diminished without reducing the security to which the owners of the bonds were entitled. *Opinion of the Justices*, 605.

10. In the stipulation on the face of the bonds issued to pay for the construction of the East Boston tunnel, stating as required by St. 1897, c. 500, § 17, that "the whole amount of the rentals for the use of and tolls for persons passing through the East Boston tunnel is pledged for the payment of the principal and interest of this loan," the tolls pledged by the contract include the payments made by those who leave the tunnel without passing through the whole of it, and the Legislature has not the power to abolish the toll of one cent required from persons travelling in the tunnel between Scollay Square and Atlantic Avenue. *Ibid.*

Regulation of Commerce with Foreign Nations.

11. The provisions of R. L. c. 65, §§ 15, 16, permitting hawkers and pedlers to sell agricultural products of the United States without a license and requiring a license for the sale of articles of the growth or production of foreign countries, are unconstitutional and void as an attempted regulation of commerce with foreign nations in violation of Const. of U. S. art. 1, § 8. Whether this unconstitutional part of the statute is so far separable from the rest of the statute, and of so little comparative importance, as to leave the other provisions of the statute in force was not considered. *Commonwealth* v. *Caldwell*, 355.

CONTRACT.

What constitutes.

1. If a piano dealer sells a new piano to a woman and agrees to take in exchange her old piano which has been injured in an elevator while being moved by an expressman and to look to the expressman for the difference in value, he cannot recover this difference from her if the expressman refuses to pay it. *M. Steinert and Sons Co.* v. *Jackson*, 428.

2. An importer of paper stock agreed with a paper manufacturer to sell him imported merchandise for the actual cost of the merchandise to the importer and the sum of one dollar per ton. To enable the importer to carry out this contract, and with the knowledge of the manufacturer, a banker advanced the money to pay for the imported merchandise on drafts under a commercial letter of credit accompanied by bills of lading of the merchandise to the order of the banker, whereby he became the owner of the merchandise. He indorsed the bills of lading to the importer in exchange for trust receipts by which the importer agreed to hold the merchandise

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Contract (*continued*).

in trust or in storage as the property of the banker with liberty to sell and deliver the merchandise to the manufacturer and pay the proceeds to the banker. The arrangements between the importer and the banker were known to the manufacturer, and the terms of the contract between the importer and the manufacturer were known to the banker. Under this contract merchandise was delivered by the importer to the manufacturer who paid what he believed to be the price under the contract directly to the banker. Unknown to the banker and the manufacturer the importer fraudulently had made a secret arrangement with the seller of the merchandise in a foreign country by which the seller added to the invoice price fictitious freight charges greater than the actual freight charges to be paid by the importer. This caused the payments for the merchandise made by the manufacturer to the banker to be greater than they should have been under the terms of the contract between the importer and the manufacturer. In ignorance of the fraud, the banker after deducting the amount of his advances and expenses turned over the balance of the purchase money to the importer, or credited him with it in a settlement of accounts. *Held*, that the merchandise delivered by the importer to the manufacturer was sold by its owner, the banker, to the manufacturer under an oral agreement on the terms of the contract between the importer and the manufacturer, that the manufacturer, having paid to the banker the wrongful freight charges in excess of the amount due under that contract, could recover from the banker the amount of such excess as money paid under a mistake of fact, and that the fact that the banker had paid the money to the importer or had credited it to him in a settlement of accounts was no defence. *Moors* v. *Bird*, 400.

Implied: Common Counts.

3. The owner of a note and a mortgage of land securing it by offering to pay a broker, who has full knowledge of the character of the mortgage, a commission for selling the note and mortgage makes no implied agreement that if the broker will find a purchaser the mortgage will give the purchaser a perfect title to the land in case the note is not paid. *Wiggin* v. *Holbrook*, 157.

4. One who under a mistake of fact thinks that he owes money to a certain person and at his request pays the money to a creditor of that person cannot recover the money from the recipient, the payment in legal effect being made not to the recipient but to his debtor. *Moors* v. *Bird*, 400.

5. Money paid and received under a mistake of fact caused by the fraud of a third person can be recovered from the person to whom it is paid. *Ibid.*

Agent's liability to principal for profits of principal wrongly appropriated, see AGENCY, 2, 3.

As to liability of infant for services of an attorney at law unsolicited by him or his guardian, see INFANT.

One who brings an action on an account annexed for disbursements and services as manager of a farm will not be allowed to recover on the items for wages if it appears that he intentionally has failed to carry out the terms of his agreement as to services, see *post*, 7, 8.

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Validity.

Promissory note delivered by husband to wife through indorsement of third person having no beneficial interest void in equity as well as at law, see HUSBAND AND WIFE, 2.

Consideration.

For consideration of negotiable instruments, see BILLS AND NOTES, 1–4.

Construction.

6. In an action of tort by one manufacturing corporation against another, they being adjoining riparian owners on a natural watercourse and the plaintiff's mill being below that of the defendant, for withdrawing water from the stream and returning it below the plaintiff's mill instead of above it, so that the plaintiff was deprived of its use, the defendant showed that the plaintiff's grantor, by whose act the plaintiff was bound, by an agreement in writing granted to the defendant for a term of years still unexpired the right and privilege of running its condensing water into a cooling pond of the plaintiff below the plaintiff's mill and "to use said pond, dam and arrangements, as it now uses them, and has so used," and further showed that the use then and previously made by the defendant was to withdraw water from the stream for condensing purposes and instead of returning it into the stream so as to give the plaintiff the benefit of its flow, to discharge it by a different conduit into the plaintiff's cooling pond, where it could not be used by the plaintiff, and that this manner of using the water continued during the first ten years of the existence of the agreement. The agreement containing the grant to the plaintiff's grantor concluded with this clause: "By executing this instrument neither party waives any rights as riparian owners on said stream." *Held*, that the clause last quoted should be construed as if it read, that no riparian rights other than those granted by the preceding parts of the agreement were waived by either party, and consequently that the defendant, having established its right to do the acts complained of by the plaintiff, was entitled to judgment. *New England Cotton Yarn Company* v. *Laurel Lake Mills*, 48.

Construction of insurance policy forbidding other insurance without assent of company with rider requiring insurance to at least eighty per cent of value, see INSURANCE, 5.

In accident insurance certificate agreement of insured to prove disability to satisfaction of board of directors is agreement to furnish proof which reasonably should satisfy directors, see INSURANCE, 11.

Construction of other contracts of insurance, see INSURANCE, 3, 6–10, 15.

Building Contract.

Decision involving finality of referee's decision under a building contract as to both law and facts, see REFERENCE AND REFEREE.

For damages under building contract, see *post*, 9.

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Performance and Breach.

7. One cannot recover on a contract if he intentionally has failed to perform a part of it, although the part which he has failed to perform may not be of the essence of the contract. *Sipley* v. *Stickney*, 43.

8. A person employed to carry on a farm in the absence of the owner, whose duty it has been to render true and accurate accounts of the expenses of the farm, can not recover against his employer for his services, if he intentionally has deceived his employer as to the expenses incurred in running the farm by holding back certain bills which ought to have appeared in his accounts, even if this breach of his duty has caused no loss to his employer. *Ibid.*

9. A contract for the construction of a building provided that the whole of the work should be completed on April 1 of a certain year, and that, in case of a failure of the contractor to complete the building by that date, he should forfeit to the owner $10 per day for each day of delay in completing the building, "the forfeit to be deducted from the contract price." On May 20 the building was substantially completed, but never was wholly completed by the contractor as required by the specifications. There being a dispute as to what the specifications required, the contractor retained possession of the building until on October 6 of the same year the owner put him out and completed the requirements of the contract through the employment of other persons at a cost of about $400, which fairly represented the value of the work. In an action by the contractor on an account annexed for work done and materials furnished, it was *held*, that, besides deducting from the contract price the sum paid by the defendant in completing the building, the defendant was entitled to deduct as liquidated damages the sum of $10 per day not only to May 20, when the building was substantially completed, but also from May 20 until October 6, when the defendant terminated the employment of the plaintiff and took possession of the building. *Phaneuf* v. *Corey*, 237.

For condition in insurance policy forbidding other insurance broken by assignment of policy to one who had other insurance in excess of policy's provisions, see INSURANCE, 5.

For allegations of willingness of plaintiff to perform and of breach of contract by defendant held sufficient on demurrer to declaration by police officer in action against city for salary, see PLEADING, CIVIL, 1.

CONVERSION.

In an action against a common carrier for the alleged conversion of articles entrusted to him for transportation, it appeared that the plaintiff employed and paid the defendant to carry certain boxes, barrels, trunks and a sewing machine to the defendant's office and there to keep them until ordered by the plaintiff to take them to a railroad station for shipment, that the boxes, barrels and trunks contained household goods, wearing apparel, a ten dollar bill and other articles, but that the defendant did not know what they contained, that a few days later the plaintiff made a general

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demand for the property and the defendant refused to let him have it, saying that the property had been attached and that he would let the law take its course. The defendant offered to show that he had been summoned as trustee in an action in which the plaintiff under a somewhat different name was the defendant, and that he had appeared therein but had not yet been charged or discharged as trustee. The judge excluded the evidence, and ruled that the service of the trustee writ on the defendant and the pendency of the action in which it was served were not a defence to the action for the conversion. *Held*, that the ruling was wrong, it being the duty of the defendant, in spite of the plaintiff's general demand, to keep the goods which had been attached in his hands so that if charged as trustee he could deliver them to the officer to be taken on execution. *Semble*, that, even under a general demand, the plaintiff might have a right to have the sewing machine delivered to him. See R. L. c. 177, § 34, cl. 12. *Cornell* v. *Mahoney*, 265.

COPLEY SQUARE.

Assessment of damages under statute limiting the height of buildings on and near Copley Square in Boston as applying to the damage to Westminster Chambers, see DAMAGES, 5–7.

Building line not having been established on Copley Square by the park commissioners, law limiting height of buildings bordering on a park to seventy feet does not apply, see BUILDING LINE.

CORPORATION.

Powers of Directors.

1. The directors of a Massachusetts corporation, in the absence of a by-law or a vote of the stockholders restricting their power, have authority to establish a reasonable salary for the services of the treasurer of the corporation. *Fillebrown* v. *Hayward*, 472.

Directors cannot delegate power of determining and distributing dividends, see *post*, 3.

Validity of Action of Directors in fixing Salary of one of them.

2. A vote of the directors of a Massachusetts corporation fixing the salary of the treasurer of the corporation, if the directors in good faith regard the salary as a fair compensation for the services and there is no purpose to appropriate corporate profits unlawfully under the guise of a salary, is not invalidated by the fact that the board of directors that passed the vote consisted of three persons of whom one was the treasurer and another the treasurer's daughter. *Fillebrown* v. *Hayward*, 472.

Statutory Liability of Directors.

3. In an action by a creditor of a corporation to enforce the statutory liability of the directors of the corporation under R. L. c. 110, § 58, cl. 1, by reason of their making a dividend which it was alleged rendered the corporation insolvent, it appeared that the stockholders voted to authorize the directors to sell all the property of the corporation for $70,000, and that

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the directors thereafter voted to sell all the property of the corporation including bills and accounts receivable, to a person who held all the capital stock, for $70,000, and to pay that sum when received to the stockholders, reserving however a sufficient amount of bills and accounts receivable to pay all its debts, and authorized the president to carry out the vote, that the debts of the corporation amounted to $12,000, that the bills receivable retained by the corporation were of the face value of only $3,500, and that the $70,000 paid by the purchaser was immediately repaid to him as the only stockholder. *Held*, that the distribution of the proceeds of the sale of all the property of the corporation was a dividend within the meaning of the statute, and that the evidence justified a finding that the action of the defendants in declaring the dividend rendered the corporation insolvent; *also*, that the directors could not avoid their liability by authorizing the president to carry out their vote. *Pennsylvania Iron Works Co.* v. *Mackenzie*, 61.

Statutory Liability of Officers and Stockholders of Foreign Corporation.

4. The liability of the officers and stockholders of a foreign corporation having a usual place of business in this Commonwealth for the debts of such corporation under R. L. c. 126, § 18, if they have participated in a conveyance to the corporation of property at an unfair valuation in payment for capital stock of the corporation, is not rendered less enforceable by the provision of § 19 of the same chapter excepting persons so liable from the operation of the fourth clause of R. L. c. 110, § 58, while making them subject to the rest of §§ 58–68 of that chapter, the fourth clause being excepted because it provides that in the case of domestic corporations, where property mentioned in the statement required by another section of that statute is not conveyed and taken at a fair valuation, only the officers signing the statement shall be liable, while c. 126, § 18, provides that in the case of foreign corporations all officers and stockholders participating in a conveyance to the corporation at an unfair valuation in payment for capital stock shall be liable. *Anthony and Scovill Co.* v. *Metropolitan Art Co.* 35.

5. In a suit in equity to establish the individual liability of officers and stockholders of a foreign corporation having a usual place of business in this Commonwealth under R. L. c. 126, § 18, for the debts of the corporation on the ground that they have participated in a conveyance to the corporation of property at an unfair valuation in payment for capital stock of the corporation, it is no defence that the defendants in signing a certificate of the valuation found to be unfair did so without any fraudulent intent and without actual knowledge that any statement contained in it was false, their liability under the statute depending not on fraudulently signing a certificate but on participating in a conveyance of property at an unfair valuation in payment for capital stock, and it being made the duty of such participants to know that the valuation is fair. *Ibid.*

Rights of Stockholders.

6. A bill in equity by the holder of a voting trust certificate representing common stock in a corporation, to set aside a sale of the common stock or

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of the voting trust certificates representing it by a protective committee of the certificate holders, alleged that a "pooling agreement," creating the protective committee and defining their powers, authorized that committee "to negotiate in behalf of the owners for the sale of the pooled stock, and . . . to agree to sell not less than two thirds of the pooled stock at such price as may be approved in writing by owners representing two thirds of the pooled stock," that the committee made an agreement, subject to the assent of the owners of the pooled stock, to sell all or at least not less than two thirds of the pooled stock at a certain price per share, that before executing this agreement the committee sent to the certificate holders a notice of the offer to purchase the stock, naming the price but not purporting to state, and not stating, all of the terms of the agreement, enclosing a card on which was printed an authorization of the sale of the stock by the committee at the price named, which was signed and returned by the plaintiff and the other certificate holders. There was no averment that the members of the committee were not ready to give or did not give full information as to the proposed sale to any certificate holder who desired it, and no averment that the price was inadequate or that it was below either the market value or the intrinsic value of the stock, or that a higher price could have been obtained from any other purchaser, or that the bargain was not an advantageous one for the stockholders, and the agreement, a copy of which was annexed to the bill, was not unreasonable upon its face. On demurrer, *held*, that the bill disclosed no ground for equitable relief. *Weitze* v. *Burrage*, 267.

Criminal Liability of Officers.

Criminal liability of officer of corporation under R. L. c. 258, § 58, for making false entries in books of corporation, see FALSE ENTRIES, 1–3.

Corporate Negligence.

Violation of city ordinance by motorman not negligence of street railway corporation as such under R. L. c. 111, § 267, see NEGLIGENCE, 27.

Rights of Trustee in Bankruptcy.

Trustee in bankruptcy of corporation cannot recover in equity amount of payments fraudulently made by absconding treasurer of his own debts with checks of corporation, as against holder in good faith and for value, see EQUITY JURISDICTION, 9.

COVENANT.

Betterments assessed under St. 1902, c. 527, for work done in 1895 not breach of covenant against incumbrances in deed made in 1897, see DEED, 3.

For breach of covenant against incumbrances because of existence of right of way created by agreement in deed, see WAY, 3.

Covenant against incumbrances in deed, if incumbrance exists, broken when made, see DAMAGES, 8.

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CRANBERRIES.

Right under deed to raise waters of pond for purpose of flowing grantee's cranberry bog does not include right to use pond as reservoir to retain water for later flowing, see EASEMENT, 1.

Proper remedy for unlawful flowing of cranberry bog, see PRACTICE, CIVIL, 4.

Gathering cranberries on Lord's day when crop is unusually large but there is no sudden and unexpected emergency not work of necessity, see LORD'S DAY.

DAMAGES.

Proximate Cause: Remoteness.

1. If a passenger holds a ticket from a parlor car company entitling him to a drawing room in a certain car on a train leaving a certain city at 9.40 P. M. and due at his destination at 3.45 A. M. with the privilege of occupancy until 7 A. M., and there turns out to be no drawing room in the car designated, and if the car company offers him a drawing room equal to that called for by his ticket which will be ready for occupancy at 10 P. M. on a train leaving at 12.30 A. M. and arriving at 7.19 A. M., and the passenger refuses this offer, and also refuses the offer of a section in the car named by his ticket, and sits up all night in an ordinary passenger car on the same train, thereby aggravating a valvular disease of the heart from which he suffers, and in consequence is made ill and temporarily unable to work, he can recover from the car company only nominal damages, the direct and proximate cause of his illness being his refusal to accept the accommodations offered to him and not the car company's breach of contract in failing to furnish him with a drawing room in the car named on his ticket. *Ingraham* v. *Pullman Co.* 33.
2. In an action to recover damages for the plaintiff's illness and consequent loss of work alleged to have been caused by a breach of contract on the part of the defendant, the defendant can introduce evidence to show that the alleged consequences of the breach of contract by the defendant could have been avoided by the exercise of reasonable care and prudence on the part of the plaintiff. *Ibid.*

Result of Injury.

3. In an action by a man of the Jewish faith, the proprietor of a barber's shop, against several persons also of the Jewish faith for gathering with others in front of the plaintiff's shop on a certain evening, ordering him to close his shop, and on his refusing to do so threatening him, throwing missiles into his shop and preventing customers from entering, whereby it was alleged that the business of the plaintiff was injured and finally destroyed, there was evidence, held to have been admitted properly, that the day in question was kept by the so called Orthodox Jews as a holiday on which no business was done by Orthodox Jews. It appeared that the disturbance did not last more than one hour and that after that the shop was

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kept open during the remainder of the evening, and there was no evidence from any customer that he ceased to patronize the shop because of fear that the disturbance would be repeated. The presiding judge instructed the jury that if they found that the defendants participated in any acts of violence or in any trespass upon the shop, the plaintiff might recover such damages as the defendants actually inflicted upon the premises and such loss of custom on the night of the disturbance as they might find that the plaintiff had sustained by any interference with his business, but instructed them to disregard any evidence of loss of business after the night of the disturbance as there was "no natural connection" between such loss and the disturbance of that evening. *Held*, that the instructions were correct; that the evidence did not go far enough to show that the disturbance was the cause of the plaintiff's subsequent loss of business, it being at least as likely that the loss occurred from his customers of the Jewish faith leaving him for keeping his shop open on a day when no business is done by Orthodox Jews. *Botkin* v. *Miller*, 411.

Damages for failure to deliver scenery and other theatrical property which reasonably should have been foreseen by carrier after notice of circumstances, see *post*, 9.

For Property taken or damaged under Statutory Authority

4. Under St. 1894, c. 288, § 5, providing for the assessment of damages from the taking of land or any right therein by the metropolitan park commissioners for the construction of roadways and boulevards, one whose land is damaged by the taking of other land for the purposes named in the act may recover damages although no part of his own land is taken. Following Hyde *v.* Fall River, 189 Mass. 439. *Whitney* v. *Commonwealth*, 531.

5. The violation by the owners of the Westminster Chambers in Boston of the provisions of St. 1898, c. 452, § 1, by erecting "sculptured ornaments" approved by the park commissioners extending above the height of ninety feet allowed by that statute, they having been found to have acted in good faith on the advice of counsel in trying to make the best use possible of their unfinished building after the enactment of the statute, does not deprive them of the right to compensation under §§ 3, 4, of the statute. *Williams* v. *Boston*, 541.

6. In St. 1898, c. 452, limiting the height of buildings on and near Copley Square in Boston, § 4 gives compensation for damage or loss to real estate, and § 3 gives to the owner of or any person having an interest in a building on the land described in that statute in process of construction before a certain day compensation for any damage suffered from the operation of the act other than damage or loss to real estate, the amount recoverable under one of these sections being exclusive of anything that can be recovered under the other. Thus extra foundations and extra iron for a building one hundred and twenty feet high not needed for a building ninety feet high, if they were incorporated in the building before the enactment of the statute, are an element of damage under § 4 in determining

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the difference in the value of the building as it was before the act and after it, and the loss on these materials which have become part of the real estate cannot be recovered under § 8. *Williams* v. *Boston*, 541.

7. At the trial of a petition under St. 1898, c. 452, § 4, by the owners of the building called the Westminster Chambers in Boston for damage or loss to their real estate by reason of the limitation of the height of buildings on and near Copley Square imposed by § 1 of that statute, the presiding judge in his discretion may admit evidence of the value of the building as planned before the limitation of height and of its value as finished under that limitation, of the rental value of the two, and of the cost of completing the building in connection with evidence showing that completing the building was the best thing to do and that the cost so incurred was reasonable. *Ibid.*

Petition under St. 1900, c. 453, for damage to real estate caused by abolition of grade crossing where petitioner was mortgagee and did not comply with requirements of R. L. c. 111, §§ 112, 118, see GRADE CROSSING ACTS.

Time of Assessment.

8. A covenant against incumbrances in a deed, if an incumbrance exists, is broken as soon as made and the damages must be assessed as of the date of the deed. *Bailey* v. *Agawam National Bank*, 20.

Measure.

9. In an action against a railroad company for failure to deliver scenery and other theatrical property received from the plaintiff for transportation with full knowledge that they were to be used in exhibitions previously widely advertised at the place of destination and that the expenses of the owner in connection with the exhibitions were to be large, the plaintiff, on proof of negligent delay in delivery, can recover the amount of the ordinary gross earnings from the exhibitions which he was prevented from giving less the amount of the expenses from which his inability to use the property saved him. *Weston* v. *Boston & Maine Railroad*, 298.

10. Damages where a salesman sells goods of his employer to himself under a false pretence that the sales are to a wholesale agent of his employer and then resells at an advance are not nominal but equal the difference between the net retail price of the goods and the amount turned in by the salesman for them. *George N. Pierce Co.* v. *Beers*, 199.

Liquidated.

Assessment of liquidated damages provided for under terms of building contract, see CONTRACT, 9.

DEED.

Consideration.

1. A deed of real estate from a mother to a son, one of her three children, recited that it was given in consideration of one dollar and other good and valuable considerations, and contained a clause declaring the conveyance

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to be upon the condition, that the grantee and his heirs and assigns and all future owners of the estate should support the grantor for and during the term of her natural life. It was found that the conveyance was made by the mother to her son out of gratitude for his kindness to and care of her in the past and his promise to care for her in the future, and that the son, although willing to do so, did not in fact support his mother at any time from the giving of the deed until her death. *Held*, that the deed was a voluntary conveyance and that the son had no better title than his mother. *Sunter* v. *Sunter*, 449.

Boundary.

2. The owner of land on which stood a two story and a half wooden dwelling house conveyed "The southerly half of my dwelling-house in G. as the same is divided by the partition from the northerly part of said dwelling-house, together with the southern half of the land adjoining thereto, reserving liberty of a free passage into and out of the cellar by and through the fore cellar doorway, together with all the privileges and appurtenances to the same half house and land any way belonging." The partitions running through the house from east to west on the first and second floors were substantially although not exactly in the same vertical line and divided the house into nearly but not exactly equal parts. They also ran nearly but not exactly in a straight line through the house from front to rear. The partition in the attic was in a straight line dividing the house about equally but was not in a vertical line with the other partitions, being nearer the exact middle of the house. There was no cellar under the rear part of the house. There was a partition in the cellar but its line was very irregular. *Held*, that the deed passed the title to that part of the structure which was south of the line of the partition in each story, that the cellar on each side was appurtenant to the house above, and that the land adjoining the house was intended to be divided by the same general line that divided the house; that the partitions of the first and second stories, running east and west, if in the same vertical line and with the same termini at the front and the rear of the house, should determine the ownership of the adjoining land, or, if it should appear that there was a difference in the termini of the partitions of the first and second stories, the termini of the first story should fix the boundary line of the land. It was not disputed that there was an easement of a right of mutual support and shelter for the several portions of the house belonging to the respective owners. *Jeffery* v. *Winter*, 90.

Right of Way.

As to creation of right of way by exception, by reservation or by agreement in deed, see WAY, 1–3.

Water Rights.

For construction of grant in deed of easement to use of water to flow cranberry bog and consequently to flow grantor's land, see EASEMENT, 1.

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Show Window.

Right to use show window contemplated by both landlord and tenant at time of letting store and affecting amount of rental paid passes to tenant although not expressly mentioned in lease, see LANDLORD AND TENANT, 1.

Covenant against Incumbrances.

3. In 1897 the defendant conveyed to the plaintiff certain land on or near Columbus Avenue in Boston by a quitclaim deed covenanting against all incumbrances made or suffered by the grantor. In 1895 the city of Boston under St. 1894, c. 416, by valid orders laid out an extension of Columbus Avenue, affecting the land in question. The work of construction under these orders, which began before the defendant gave the deed to the plaintiff and was completed in 1899, was done in violation of the statutes applying to it and no valid assessments for betterments could be made for it. St. 1902, c. 527, authorized the street commissioners to assess betterments for work completed within the six years next preceding the passage of the act, and under this statute the street commissioners imposed a valid assessment on the land for the work completed in 1899, which the plaintiff paid. *Held*, that the defendant was not liable for breach of covenant as at the time the deed was given there was no incumbrance. *Maloy* v. *Holl*, 277.

Covenant against incumbrances, if incumbrance exists, broken as soon as made, see DAMAGES, 8.

DEVISE AND LEGACY: CONSTRUCTION.

Gift to Children treated separately as to each.

1. A will contained the following provision: "And as to the other fourth part of the residue and remainder of my estate, I direct my said trustees to hold the same (after my said daughter S.'s decease) during the lives of her children, and to pay the net interest and income thereof to her children half yearly or oftener, if convenient to said trustees, and at the decease of said S.'s children the said fourth part of the capital of said residue and remainder of my estate shall be paid to her grandchildren, as they respectively attain the age of twenty-one years, such grandchildren taking by right of representation, and while said grandchildren are minors, after the decease of their parents they shall respectively receive the net income of the capital to which they will severally be entitled to at their majority." At the time of the death of the testator, S. had one child, a son. Afterwards she had a daughter who died before her without issue. Upon the death of the son of S., who survived his mother and left children, the trustee under the will of the testator brought a bill for instructions as to the distribution of the fund dealt with by the paragraph above quoted, asking whether the remainders to the grandchildren of S. were void under the rule against perpetuities. *Held*, that the bequest to the children of S. was of shares to be disposed of separately and that the limi-

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tation over of each share was to be considered by itself, that on the death of the testator the son of S. had a vested remainder in a life interest in the fund which on the birth of the daughter of S. was diminished by opening to give such daughter a vested remainder in a life interest in one half of the fund, that the remainder of one half of the fund to the children of the son of S. was valid because the son was born before the death of the testator, and that the half of the fund in which the daughter of S. had a vested interest, upon her death before her mother without issue, was undisposed of by the will and should be distributed among the next of kin of the testator. *Semble*, that if the daughter of S. had left children the same result would have been reached, as the remainder to her children was void under the rule against perpetuities. *Minot* v. *Doggett*, 485.

What Estate passes.

2. A testator, whose estate was not large, left by his will $500 to his housekeeper "to be in trust of my executor and put in savings bank, the income to be paid to her yearly, and the executor can draw this money, and buy a cheap place for her to occupy during her life if he thinks it would be for her good." The will contained no residuary clause. On the death of the legatee the fund remained in the hands of the trustee unimpaired. *Held*, that the gift was absolute, subject to the trust during the lifetime of the legatee, and that on her death the legal title vested in the administrator of her estate. *Hayward* v. *Rowe*, 1.

Gift per Capita.

3. The residuary clause of a will was as follows: "The balance of my estate is to be divided in equal portions to" (naming three persons) "daughters of my deceased brother P. my brother J. the children of my deceased sister M." (naming four persons). The will was in the handwriting of the testator. The name and residence of his brother J. were written in a separate paragraph in the centre of the residuary clause. Above it was the paragraph which named three daughters of his deceased brother P., and below it was the paragraph which named four children of his deceased sister M. The testator at the time of his death had three sisters living not mentioned in this clause, and there were living six children of his deceased brother P. and six children of his deceased sister M. *Held*, that the property should be distributed among the eight persons named *per capita* and not *per stirpes*. *Hardy* v. *Roach*, 223.

Time of Ascertainment.

4. A testatrix bequeathed to trustees a sum of money in trust, directing them to invest it and pay to K. the income therefrom during her life, "and after her decease to pay, distribute and divide the said principal fund, however the same may be then invested, to and among the children of said K. and the issue of any deceased child by right of representation." *Held*, that the gift in remainder was to those persons who at the time of the death of K. were her children and the issue of any deceased child by right of representation, and that a child of K. who, surviving the testatrix,

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died in the lifetime of K. leaving no issue had no interest which would pass to his or her legal representative. *Crapo* v. *Price*, 317.

5. Where there is a gift by will to the children of the testator for life, providing that as each child dies the share of the child so dying shall go to the issue of that child or if the child has left no issue to the surviving sons and daughters of the testator, the surviving sons and daughters are those who survive the beneficiary for life who has died without issue, unless this ordinary meaning of the words is controlled by the context. *Dary* v. *Graw*, 482.

6. A testatrix directed that, after a life interest in her husband, the residue of her estate should be distributed into nine equal parts. Two parts she gave to two sons outright. Another ninth part she gave to four grandchildren, the children of A. who had married successively two daughters of the testatrix, one the mother of one of the four grandchildren and the other of the other three, and both dead. The remaining six parts she gave in trust to distribute to her six other children, one son and five daughters, naming them, and on the decease of each of them, leaving issue, to give the share of which the child so dying received the income to the issue of that child, but on the decease of any of her said six children "without leaving issue then the share of said trust property with all accumulation thereon so devised for the use of such son or daughter so dying without issue, shall be held by my trustees aforesaid for the use of my surviving sons or daughters to be equally divided between them and the shares devised in trust are to be held upon the like trusts and purposes herein already before declared and finally to be conveyed, divided and distributed among their issue as herein before provided." The last surviving child of the testatrix died without leaving issue. On her death the trustee under the will brought a bill for instructions. There were issue living of four children of the testatrix who had survived her. There also were issue living of the two daughters of the testatrix who had died before her, the successive wives of A. One of the sons of the testatrix who survived her had died testate without leaving issue. *Held*, that the property was to be distributed *per stirpes* among the issue of the four children of the testatrix who survived her and left issue. *Ibid.*

When Estate vests.

7. A will contained the following provision: "I direct my said trustees to pay in like manner, one quarter part of the nett income of said residue and remainder to the children of my deceased son H. during their natural lives, to be paid to them severally, half yearly, or oftener if convenient to my trustees, on their personal receipts, or their guardians and in case any of said H.'s children decease without issue, the share of such deceased child to go to the survivors, and upon the decease of my said son H.'s children I direct that one quarter part of the residue and remainder of my estate be distributed among his grandchildren, such grandchildren representing their parents and receiving their shares as they respectively attain the age of twenty one years and in the mean time to receive the income of

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their respective shares." *Held*, that the interests of the grandchildren of H. vested on the death of the testator, subject to being lessened by the opening of the remainder to let in after born grandchildren, and that the interests thus vested in the grandchildren included their vested interests in the contingent remainders which would accrue to them on the death of any of H.'s children without issue. *Minot* v. *Purrington*, 336.

Perpetuities.

Semble that a bequest of a fund to trustees to pay the income to the testator's daughter during her life, then to her children, and at the death of her children to her grandchildren is void under the rule against perpetuities as to grandchildren not living at the time of the death of the testator, see *ante*, 1.

DISTRICT MESSENGER COMPANY.

Corporation supplying messenger boys for ordinary messenger service is not common carrier, see CARRIER, 1; NEGLIGENCE, 30, 31.

DIVORCE.

See MARRIAGE AND DIVORCE.

DOWER.

Sale of dower rights of insane widow under guardianship, see PROBATE COURT, 1, 2.

EASEMENT.

1. A grant by deed of the right to raise the water of a pond fed by a stream for the purpose of flowing the cranberry bog of the grantee adjoining the stream above the pond does not give the grantee the right to use the pond and the bog of the grantor adjoining it as a reservoir to hold water to be used afterwards by the grantee in flowing his bog. *Nye* v. *Swift*, 143.
2. If one owning land with a dwelling house on it conveys about one half of the land and house, dividing the house vertically and making the boundary on each floor a partition nearly but not exactly in the centre of the house, the partitions on the different floors not being in the same vertical line, the grantee and the grantor each has an easement to maintain that part of the structure which belongs to him and extends over the land of the other. *Jeffery* v. *Winter*, 90.

Owners of adjoining parts of dwelling house divided vertically held to have easements of mutual support, see DEED, 2.

Rights of way created by exception, reservation, or agreement in deed, see WAY, 1–3.

Right of using for house sewer new channel for Neponset Avenue branch of Stony Brook included in taking by street commissioners of city of Boston of right to maintain new channel "and other sewerage works," see MUNICIPAL CORPORATIONS, 8.

For easement to make unusual use of waters of natural watercourse under agreement between adjoining riparian mill owners, see CONTRACT, 6.

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EAST BOSTON FERRY.

City of Boston in operating East Boston ferry is common carrier, see MUNICIPAL CORPORATIONS, 3.

EAST BOSTON TUNNEL.

Tolls in East Boston tunnel cannot be diminished by Legislature while bonds of city of Boston secured by them are outstanding without impairing obligation of contract inserted in bonds, see CONSTITUTIONAL LAW, 9.
Tolls referred to above are net tolls and include tolls charged for passage through any part of tunnel, see BOSTON, 2; CONSTITUTIONAL LAW, 10.

ELECTIONS.

Neither election commissioners nor board of aldermen have authority to place voting booth in travelled part of highway in Boston, see MUNICIPAL CORPORATIONS, 6.

ELEVATOR.

R. L. c. 104, § 27, requiring certain safety devices for elevators whether used for freight or passengers does not apply to a temporary elevator erected and maintained by a contractor for transporting materials used in the construction of a building. *Rippucci* v. *Commonwealth Construction Co.* 518.
Where plaster wall of well of freight elevator running from sub-basement to street sidewalk is scratched and banged by operation of elevator, proprietor not liable to employee using elevator for injury caused by catching toe in small hole in wall, see NEGLIGENCE, 8.

EMPLOYER'S LIABILITY.

To employee, see NEGLIGENCE, 4–9.
To third person, see AGENCY, 6; ASSAULT AND BATTERY, 1.

ENTICING CREW OF VESSEL TO DESERT.

Complaint for enticing alleged member of crew to leave vessel of burden of fifty tons or upwards bound to a port in any other than an adjoining State cannot be maintained unless shipping articles had been signed by master as well as seamen, see SHIP.

EQUITABLE RESTRICTIONS.

For enforcement in equity of right of way created by agreement in deed, see EQUITY JURISDICTION, 14.

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EQUITY JURISDICTION.

Laches.

1. There can be no laches where a plaintiff exercising reasonable diligence has remained for many years in ignorance of the facts which give him a right to relief in equity and on learning the facts files his bill. *Sunter* v. *Sunter*, 449.

2. In 1887 a widow, who had been appointed the guardian of her three minor children, conveyed to herself through a third person certain land belonging to her wards without paying anything for their benefit. She then built a house on the land which she used for her own benefit. The three children came of age respectively in 1889, 1893 and 1896. In December, 1903, she made a voluntary conveyance of the real estate to one of the three children, having given him possession of the property in November of the previous year, and in February, 1904, died. Two months after her death her other two children brought a suit in equity to set aside the conveyance of their mother indirectly to herself in 1887, and for an accounting. It appeared that the plaintiffs knew nothing of what their mother had done in regard to the real estate until after her death. *Held*, that there was no laches on the part of the plaintiffs. *Ibid.*

On bill for construction of trust in will and for instructions as to further distribution, where there has been previous erroneous construction by decree on former petition, silence for about seventeen years will not bar claim of beneficiaries to have terms of trust construed rightly as to all further distributions, they and their predecessors having been absent from Commonwealth, on the sea or in foreign country, and not having known of previous decree, see TRUST, 6.

Statute of Limitations.

One owning boat house maintained adversely under claim of right upon public landing place for less than forty years cannot maintain bill in equity to restrain its removal by properly constituted authorities, see LANDING PLACE.

Res Judicata.

On bill for instructions by trustee as to distribution under clause of will previous decree of Probate Court on former bill for instructions interpreting same clause conclusive as to distribution made under it but not as to construction of clause for subsequent distributions, see TRUST, 6.

Previous Inconsistent Statements of Plaintiff under Oath.

3. A plaintiff is not precluded from maintaining a suit in equity, to redeem from an equitable mortgage real estate worth $18,000 which was conveyed by him to the defendant by a deed absolute in form but really as security for a debt of about $10,000, by the fact that the plaintiff in offering himself as a surety in a case pending in court testified that his property consisted of a billiard room and eleven tables and that his indebtedness did not exceed $50, or by the fact that he went into bankruptcy and made no reference in his schedules to his indebtedness to the defendant and no

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mention of the real estate or of any property held in trust for his benefit. *Alexander* v. *Grover*, 462.

Trusts.

4. A ward on coming of age may enforce the constructive trust which arises in his favor by reason of his guardian conveying real estate of the ward through a third person to himself and for his own benefit. *Sunter* v. *Sunter*, 449.

Trustee's bill for instructions as to distribution of trust funds where previous distributions had been made under an erroneous order of court, see TRUST, 6.

Where not necessary to have administrator *de bonis non* appointed in making distribution of trust fund, see TRUST, 5.

To redeem from Equitable Mortgage.

5. In a suit in equity to redeem one parcel of real estate and for the proceeds of the sale of another parcel there was a finding of a master warranted by the evidence that a memorandum signed by the defendant acknowledged and declared that a conveyance of both of the parcels of real estate by the plaintiff to the defendant absolute in form was an equitable mortgage to secure certain indebtedness of the plaintiff to the defendant. In confirming a decree of the Superior Court founded on this finding this court declared that, even if there had been no memorandum of the trust, in accordance with the settled law of this Commonwealth it could have been shown on the oral evidence reported by the master that the conveyance although absolute in form was intended merely as security for a debt and the trust thus established. *Alexander* v. *Grover*, 462.

Right of owner of stock indorsed by him in blank and delivered to one on oral trust and fraudulently pledged by trustee as against pledgee is only to redeem from pledge, see PLEDGE.

Accounting.

6. Since the enactment of St. 1807, c. 75, now embodied in R. L. c. 179, § 17, one who individually or by those under whom he claims has actually held and possessed land for six years before the date of a writ of entry on which a judgment for the land has been obtained against him is entitled to compensation for the value of any buildings or improvements made or erected on the land by him or by any person under whom he claims, and the statute gives him the same right where a title is established against him in a suit in equity instead of by a writ of entry. *Sunter* v. *Sunter*, 449.

7. In a suit in equity to set aside a conveyance of real estate made by the mother of the plaintiffs as the guardian of the plaintiffs and their brother, the defendant, through a third person to herself for her own benefit, and for an accounting by the defendant to whom the mother made a voluntary conveyance of the real estate two months before her death, having given him possession of the property a year earlier, it appeared that the conveyance, which was voidable by the plaintiffs, was made in 1887, by the mother of the parties, who treated the property as if it was her own, that the property then was unimproved land said to be worth $2,000, and that the mother, having acquired the legal title, built a house upon it at a cost

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of $3,885, and that she and afterwards the defendant paid the taxes on the property and for repairs and insurance. *Held*, that, on the defendant conveying to each of the plaintiffs one undivided third part of the property, and on an accounting by the defendant for the rents and profits of the plaintiffs' shares of the property after the defendant obtained possession, the plaintiffs must contribute their proportionate part of the enhanced value of the common property due to the improvements made upon it by their mother, setting off against this their shares in the rents and profits during their mother's occupation after deducting the sums expended by her for taxes, repairs and insurance, but being allowed nothing in excess of the sum charged to them for improvements. *Sunter* v. *Sunter*, 449.

Fraud.

8. If the owner of a mortgage and note long overdue, induced by fraudulent misrepresentations of an agent, assigns them to the agent who pledges them to a trust company to secure money borrowed by him personally, and the trust company takes the assignment in good faith for value and without notice of any fraud or defect in title, the owner of the mortgage and note cannot maintain a suit in equity against the trust company to compel their reassignment. *Gardner* v. *Beacon Trust Co.* 27.

9. A woman, the treasurer of a Massachusetts corporation of which she also was a director and the largest stockholder, resigned as treasurer and director and sold all her stock in the corporation to a person who for two years had been associated with her as director and who became her successor as treasurer of the corporation. He paid her for the stock partly in cash and partly in promissory notes payable one in each month for a period of five years. For a period of three years and a half these notes were paid as they fell due by checks of the corporation signed by the treasurer in that capacity, payable to him individually and indorsed by him to the former treasurer from whom he purchased the stock. The checks were received in good faith. The maker of the notes, after his purchase of the stock, acted not only as treasurer but also as president and general manager of the corporation. His management was bad, and the profits of the corporation rapidly fell off and were turned into large and increasing losses. The corporation became bankrupt and its treasurer absconded. The trustees in bankruptcy of the corporation brought a bill in equity against its former treasurer to compel repayment of the sums received by her from the checks given in payment of the notes of the absconding treasurer. The judge who heard the case found that the defendant took the checks in good faith, and made a decree in her favor. *Held*, that the decree must stand; that the question of the good faith of the defendant in taking the checks was one of fact, and that a finding was warranted that the defendant had sustained the burden of showing that she was a holder in good faith and for value. *Fillebrown* v. *Hayward*, 472.

10. A bill in equity by the holder of a voting trust certificate representing common stock in a corporation, to set aside a sale of the common stock or of the voting trust certificates representing it by a protective committee of the certificate holders, in which a director who was the financial manager

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of the corporation has been made a defendant, cannot be maintained against such manager merely on an allegation that he mismanaged and crippled the business of the corporation so as to reduce the market value of the certificates and induce the protective committee to make the sale complained of, there being no allegation that the manager and the protective committee were acting in collusion to sell the stock below its value or for any other unlawful purpose, or that there was any concert between the manager and the purchaser of the stock, or that the manager had any interest in the purchase, the alleged fraud on the part of the manager not being connected in any way with the relief prayed for. *Weitze* v. *Burrage*, 267.

Cases of constructive trusts arising because of fraudulent acts of fiduciaries, see *ante*, 4; TRUST, 3, 4.

To compel Reinstatement in Voluntary Association.

11. A suit in equity may be maintained to compel the reinstatement of the plaintiff as a member of a voluntary association from which he wrongfully has been expelled. *Mesisco* v. *Giuliano*, 352.

To relieve Property of Surety.

12. The administrator with the will annexed of the estate of a married woman may maintain a bill in equity against the executor under the will of her husband, to compel him to pay from the estate of the husband a note given by the husband and wife jointly for a debt of the husband and secured by a mortgage on real estate of the wife, so as to relieve the estate of the wife from liability. *Browne* v. *Bixby*, 69.

To restrain Wrongful Use of Trade Name.

13. A manufacturer of cigars who, not having a right to the word "Keystone" as a trademark, has established an extensive business in the New England States, where his cigars have become well and favorably known in the trade and to the public as "Keystone cigars" or "Keystones," can maintain a suit in equity to restrain the use of the word "Keystone" by another cigar manufacturer in such a way as to injure the plaintiff by causing the public to believe that the cigars sold by the defendant are those manufactured by the plaintiff, although the word "Keystone" before and at the time of its adoption by the plaintiff was used as a public brand or label in connection with the manufacture and sale of cigars, principally in the Middle and Western States; and, if in such a case a decree has been made restraining the defendant from using the word "Keystone" in the New England States, and the defendant appeals from this decree, the plaintiff taking no appeal, it is not open to the defendant to contend that the decree is too narrow, and should have been made, if at all, without geographical limitation, and it is not necessary to decide whether an injunction without geographical limitation might have been issued in favor of the plaintiff. LORING, LATHROP & HAMMOND, JJ. concurring in the result reached, but further expressing the opinion that, it not having been shown that the trade meaning of the word "Keystone" extended beyond New England, the injunction rightly was confined to that territory. *Cohen* v. *Nagle*, 4.

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To enjoin Obstruction of Passageway.

14. *Semble*, that an agreement in a deed by the owner of a parcel of land with two houses thereon conveying a part of the land with one of the houses thereon in fee and reading as follows: "A passageway is to be kept open for use in common between the two houses, ten feet in width, five feet . . . to be furnished by [the grantee] and five feet by me," is enforceable in equity by the successors in title of either the grantor or the grantee against such successors of the other as take with notice of it. *Bailey* v. *Agawam National Bank*, 20.

To enjoin other Trespass.

Equity has no jurisdiction to enjoin the removal of a show case obstructing a show window where the person removing the case has a right to the use of the window as an incorporeal right passing with his lease, see LANDLORD AND TENANT, 1.

To reach and apply Equitable Assets.

15. In a suit in equity under R. L. c. 159, § 3, cl. 7, to reach and apply equitable assets, if the alleged debtor sets up in his answer that the other defendants have not in their hands assets in which he has an equitable interest and offers evidence to prove this averment which is excluded, and if the plaintiff introduces no evidence on the subject, the defendant is entitled to a decree. *Hoshor-Platt Co.* v. *Miller*, 285.

To enforce Statutory Liability of Officers and Stockholders of Corporation.

See CORPORATION, 3–5; EQUITY PLEADING AND PRACTICE, 2.

EQUITY PLEADING AND PRACTICE.

Parties.

1. The administrator with the will annexed of the estate of a wife is a proper party to maintain a bill in equity against the legal representative of her husband, to compel the defendant to pay a note given by the husband and wife jointly for a debt of the husband and secured by a mortgage on real estate of the wife. *Browne* v. *Bixby*, 69.

Bill.

2. In a suit in equity to establish the individual liability of officers and stockholders of a foreign corporation having a usual place of business in this Commonwealth under R. L. c. 126, § 18, if the bill states facts showing that the defendants participated in a conveyance to the corporation of property at an unfair valuation in payment for capital stock of the corporation, a further allegation that the defendants made a false and fraudulent certificate as to the valuation is immaterial and may be disregarded. *Anthony and Scovill Co.* v. *Metropolitan Art Co.* 35.

3. A bill in equity praying for the reinstatement of the plaintiff as a member of a voluntary association, from which it is alleged that he wrongfully

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has been expelled, and also praying that the defendants may be ordered to pay to the plaintiff the amount of his sick benefits and the amount of expenses which he has incurred for medical attendance, is bad on demurrer for multifariousness. *Mesisco* v. *Giuliano*, 352.

Hearing before Master.

4. In a suit in equity under R. L. c. 159, § 3, cl. 7, to reach and apply equitable assets, if the alleged debtor in his answer sets up the defence that the other defendants have not in their hands any assets or securities in which the alleged debtor has an equitable interest that cannot be attached at law, and insists on this defence before a master, offering evidence to show that there is no such equitable interest to be reached, the exclusion of this evidence by the master is erroneous. *Hoskor-Platt Co.* v. *Miller*, 285.

Report of auditor appointed by Probate Court to hear evidence as to accounts admissible before master appointed by single justice of this court to hear case on appeal, see PRACTICE, CIVIL, 9.

Master's Report.

5. It is a proper exercise of the discretion of a judge sitting in equity to deny a motion to recommit a master's report in order that the master may report further findings of fact on evidence bearing upon the principal questions of fact decided by him, where the rule to the master did not call for a report of the evidence and the additional findings of fact desired are not necessary to the understanding of any question of law involved in the case. *Gurley* v. *Reed*, 509.

6. It is a wise exercise of discretion by a judge of the Superior Court sitting in equity, after a final decree has been entered and appealed from, to refuse to order a master to add to his report schedules filed by the plaintiff in bankruptcy proceedings, if the schedules are material only for the purpose of showing that certain property was not included in them, and this fact already appears in the report. *Alexander* v. *Grover*, 462.

7. Exceptions to a master's report relating only to matters of fact cannot be considered unless the evidence is reported. *Hoskor-Platt Co.* v. *Miller*, 285.

8. An exception cannot be sustained to the ruling of a master in a suit in equity admitting certain evidence *de bene* upon the statement of the party offering it that it will contradict the testimony of a witness on the other side, if no motion afterwards is made to strike out the evidence. *Alexander* v. *Grover*, 462.

Memorandum of Findings by Justice.

9. In case of an appeal from a decree in equity made by a single justice of this court, if the justice, although not requested by the appellant under R. L. c. 159, § 23, to report the material facts found by him, acting in his discretion voluntarily files a "memorandum of decision" which is a report of his findings of fact, the memorandum becomes a part of the record as much as if it had been made as a report of findings in response to a request under the statute. *Cohen* v. *Nagle*, 4.

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Appeal.

10. On an appeal from a decree in equity without a report of the evidence the findings of fact made by the judge below are conclusive. *Whitehouse* v. *Aiken*, 468.

11. A defendant in equity against whom a decree for an injunction has been made, on appealing from the decree, the plaintiff taking no appeal, will not be allowed to object to it on the ground that, if granted at all, it should have been broader in its scope. *Cohen* v. *Nagle*, 4.

12. Upon an appeal by a plaintiff from a decree in equity granting part of the relief prayed for but not the whole, the defendant if he has taken no appeal cannot raise the point that there is no jurisdiction in equity. *Clark* v. *Williams*, 219.

On appeal from final decree overruling exceptions to master's report, exceptions to master's findings of fact will not be considered unless evidence is reported, see *ante*, 7.

Memorandum of findings by justice part of record on appeal, see *ante*, 9.

ESTOPPEL.

Where the counsel of one holding a mechanic's lien on real estate receives from a registry of deeds in the usual course of his professional business with other papers a bond given under R. L. c. 197, § 28, purporting to dissolve the lien, having no knowledge that the bond is invalid, this does not estop his client from showing that the bond has no effect to dissolve the lien because a master in chancery approved it without causing an appraisal to be made. *Rockwell* v. *Kelly*, 439.

Plaintiff not precluded from maintaining bill in equity to redeem land from equitable mortgage by fact that after making the conveyance and before filing bill he had made under oath statements as to his property and indebtedness inconsistent with allegations of bill, see EQUITY JURISDICTION, 3.

One proving in court his claim to indemnity under certificate of accident insurance not limited to details of fact and evidence contained in preliminary statement filed by him with insurer in accordance with terms of certificate, see INSURANCE, 12.

One who voluntarily signs paper without reading it charged with knowledge of its contents, see BILLS AND NOTES, 5.

EVIDENCE.

Judicial Notice.

1. Judicial notice will be taken of the fact that kerosene is a product of crude petroleum. *Moeckel* v. *Cross & Co.* 280.

Presumptions and Burden of Proof.

2. Where the record of a court shows a docket entry of a judgment, which is in accordance with an agreement of the parties filed in court, there is a

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presumption of fact that the entry was made upon an order of the court unless the contrary is shown. *Washington National Bank* v. *Williams*, 497.

Where in action upon certificate of accident insurance insurer defends on ground that insured when injured was within class excepted by terms of certificate from benefits of insurance, he must sustain burden of establishing exception, see INSURANCE, 13.

Admissions and Confessions.

3. At the trial of a clerk of a corporation, who also was its general manager, on an indictment under R. L. c. 208, § 58, for making false entries in books of the corporation with intent to defraud, it having appeared that there was a deficiency in the cash of the corporation, which the defendant has testified was caused by paying dividends that had not been earned, the government may show, as evidence of an admission by silence on the part of the defendant, that the president of the corporation said in the defendant's hearing that the defendant had made wrong entries for the purpose of covering up the deficiency, and that the witness asked the president whether the counsel of the corporation was "fully informed" and the president replied "I don't think he is," and that the defendant who was present said nothing although he previously had taken part in the conversation. *Commonwealth* v. *Dewhirst*, 293.

Declarations of Former Owner of Land assenting to Change of Boundary.

4. In an action or proceeding where a boundary line is in dispute, a party who contends that his land extends to a certain stone wall, including a long triangle or wedge of land adjoining the wall claimed by him to have been acquired by adverse possession, there being evidence that the line fixed by the deeds is on one side of the wall at one end and on the other side at the other end, may show by a witness, who was employed to build the wall forty years before the trial by the predecessor in title of the opposing party, that he was ordered by his employer to throw out the three cornered piece and have the wall run straight as the boundary line, and that while building the wall he saw the predecessor in title of the party calling him as a witness, who said he was glad the wall was going to be built straight, and later said to him while he was building the wall, "Well, we will give and take. If there is any chance to give and take, we will give and take," the evidence being competent both at common law to show a boundary line assented to by the adjoining proprietors, each giving and taking land, in connection with evidence of subsequent occupation for more than twenty years in accordance with the line thus adopted, and also as a declaration of a deceased person under R. L. c. 175, § 66, showing the assent of the declarant to what was being done. *Gray* v. *Kelley*, 184.

Book Entries.

5. A ledger, incompetent because not a book of original entry, does not become competent because it has been mutilated by tearing out certain

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pages, especially where it is not shown that the original entries posted on those pages also have been mutilated, and where the fact of the mutilation is immaterial. *Clark* v. *Mulcahy*, 64.

Declarations of Deceased Persons.

6. Under St. 1898, c. 535, now R. L. c. 175, § 66, after one witness has testified to certain declarations of a deceased person admissible by the terms of that act, other witnesses may testify to similar statements of the declarant made to them. *Weeks* v. *Boston Elevated Railway*, 563.

Evidence of statements made by landowner regarding adjustment of boundary line admissible after his death where location of boundary line is in question, see *ante*, 4.

Res Gestae.

Declarations of former owners of adjoining lands admissible in proceeding where boundary line is in dispute to show character of act in assenting to building of wall on line different from that fixed by their deeds, see *ante*, 4.

Expressions of Present Pain.

7. In an action by an administrator for personal injuries incurred by the plaintiff's intestate, evidence that after the injuries the plaintiff's intestate looked sick and complained of pain, that during a drive in her own carriage she said that "it seemed as though it never rode so hard before," that she complained of her head aching, that she frequently would put one hand on her chest and one on her back and speak of distress, that she made gestures about her head and spoke of her head as paining her severely, is admissible as showing exclamations and expressions manifesting the existence of present pain. *Weeks* v. *Boston Elevated Railway*, 563.

Extrinsic affecting Writings.

8. In an action on a policy of fire insurance on a dwelling house, which is not described either as occupied or unoccupied, the plaintiff may show by oral evidence that the insured building was a dwelling house in process of construction which could not be inhabited until completion. *Harris* v. *North American Ins. Co.* 361.

9. In an action for the balance of the price of a steam roller sold by the plaintiff to the defendant under a contract in writing, described as "one of our Universal Steam Rollers of ten tons weight" and guaranteed to be "a first class and proper roller in every respect for building roads of crushed stone and gravel," the defendant cannot be allowed to show by oral evidence that when he ordered the roller before the execution of the contract he told the plaintiff that he wanted the roller for doing work between the rails of street railway tracks and that it should not be more than fifty-two inches wide and that the plaintiff agreed to furnish him a roller of that width, whereas the one furnished was fifty-four inches wide and for that reason was unsuitable for the work for which it was ordered. *Scholl* v. *Killorin*, 493.

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10. A mortgagee of land not in possession, who has filed a petition for damages for the taking of the land in the abolition of a grade crossing, in which he has alleged that he is the owner of the unincumbered fee, cannot be allowed to show that he made an agreement partly oral and partly by letter with the mortgagor for the purchase of the equity of redemption under which he made certain payments on account of the purchase price, and thus became entitled to damages as owner of the equity of redemption, if it appears that the agreement between the parties was executory and finally was reduced to writing and embodied in a bond for a deed of the land which was executed and delivered after the taking. *Taber* v. *City of Boston*, 101.

Maker of note cannot show that when he signed it he thought another person was payee, see BILLS AND NOTES, 5.

Opinion: Experts.

11. In an action for an assault and battery the attending physician was called as a witness by the plaintiff, and, being asked how seriously the plaintiff was injured, answered "quite seriously." The presiding judge requested the witness to answer the question in such a way as to show what he considered serious, whereupon he answered that he was afraid a clot or something of that nature might form upon the brain. This was objected to by the defendant and admitted by the judge. *Held*, that the answer was admitted properly as tending to throw light upon what in the opinion of the witness was the extent of the plaintiff's injuries. *Monize* v. *Begaso*, 87.

Remoteness.

12. In a suit in equity by a trustee in bankruptcy against the wife of the bankrupt to set aside a conveyance made to her by the bankrupt more than two years and a half before the adjudication in bankruptcy, the plaintiff offered to show what the bankrupt's financial condition was in the month of January of a certain year, for the purpose of showing what his intention was when he purchased the property and had it conveyed to his wife in the previous April, and also for the purpose of showing his financial condition at the time of the purchase, but he did not offer to show that the bankrupt's liabilities in the January in question were incurred in the previous April. The judge excluded the evidence as too remote. *Held*, that the exclusion of the evidence was a proper exercise of judicial discretion. *Clark* v. *Mulcahy*, 64.

Relevancy and Materiality.

13. In an action by a man of the Jewish faith, the proprietor of a barber's shop, against several persons also of the Jewish faith for gathering with others in front of the plaintiff's shop on a certain evening, ordering him to close his shop, and on his refusing to do so threatening him, throwing missiles into his shop and preventing customers from entering, whereby it was alleged that the business of the plaintiff was injured and finally destroyed, the defendants testified that as they were returning to their homes

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from worship they found a crowd opposite the plaintiff's shop and that they took no part in the disturbance. The defendants, against the objection and exception of the plaintiff, were allowed to show that the day in question was kept by the so called Orthodox Jews as a holiday on which no business was done by Orthodox Jews. *Held*, that the evidence was competent in connection with the testimony of the defendants mentioned above to explain, if the defendant's story was true, the fact that they found the crowd around the plaintiff's shop, and also was competent as an explanation of the plaintiff's loss of business from a cause not arising from the acts of trespass. *Botkin* v. *Miller*, 411.

14. In an action by a creditor of a corporation to enforce the statutory liability of the directors of the corporation under R. L. c. 110, § 58, cl. 1, by reason of their making a dividend which it is alleged rendered the corporation insolvent, if it appears that the directors sold all the property of the corporation to a person who held all of its stock and paid the purchase money back to him as a dividend, the corporation retaining an amount of assets insufficient to pay its debts, evidence of a statement of the stockholder who purchased the corporate property, that he had in his hands sufficient property to pay all the indebtedness of the corporation including the debt to the plaintiff, even if it were not incompetent as hearsay, should be excluded as immaterial. *Pennsylvania Iron Works Co.* v. *Mackenzie*, 61.

In action against messenger company for loss of money stolen by messenger, evidence that defendant knew that employers of its messengers sometimes entrusted them with money properly is excluded, see NEGLIGENCE, 31.

Methods of Proof.

For examination, cross-examination, refreshing recollection and impeachment of witness, see WITNESS, 1–6.

EXECUTION.

The provision of Pub. Sts. c. 171, § 15, now R. L. c. 177, § 16, that "no execution shall be issued within twenty-four hours after the entry of judgment" is waived by an agreement of the judgment debtor filed in court "that judgment may be entered for the plaintiff and execution issued forthwith" for a sum named. *Washington National Bank* v. *Williams*, 497.

For ATTACHMENT, see that title.

EXECUTOR AND ADMINISTRATOR.

During the pendency of an appeal from a decree of the Probate Court granting an administrator leave to sell real estate of his intestate, the administrator cannot maintain a writ of entry for it. *Tyndale* v. *Stanwood*, 513.

It is not necessary before final distribution in trust under will that administrator *de bonis non* be appointed of estate of one of the beneficiaries who died more than forty-seven years before date of distribution and whose estate then was administered and who left as his sole heir his father who since has died and whose legal representative is in court, see TRUST, 5.

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Claim by executor or administrator to land fraudulently conveyed by testator or intestate must be made within five years after his decease, see LIMITATIONS, STATUTE OF.

In action against administrator to collect debt of intestate real estate of intestate may be attached, see ATTACHMENT.

EXPLOSIVES.

Liability of one keeping products of crude petroleum contrary to provisions of statutes to person injured by explosion thereof, see NUISANCE, 2.

FALSE ENTRIES.

1. An indictment of the clerk of a corporation under R. L. c. 208, § 58, for making false entries in a book of the corporation with intent to defraud, is sufficient if it charges the commission of the crime in the language of that section, without alleging in language taken from § 59 of the same chapter that the defendant "had access or right of access" to the book in which the entries were made, that being no part of the offence described in the preceding section. *Commonwealth* v. *Dewhirst*, 293.
2. If accounts of a corporation are kept on the stubs of check books given to it by banks, false entries of deposits made on these stubs by a clerk of the corporation with intent to defraud are entries on books of the corporation within the meaning of R. L. c. 208, § 58. *Ibid.*
3. At the trial of a clerk of a corporation, who also was its general manager, on an indictment under R. L. c. 208, § 58, for making false entries in books of the corporation with intent to defraud, it is right to refuse a request of the defendant to rule "that entries made for the purpose of making a showing at the end of the quarter to induce the declaring of dividends would not be entries with intent to defraud within the meaning of the statute," as such a dividend not earned would in itself be a fraud. *Ibid.*

FALSE IMPRISONMENT.

Reasonable ground for believing that a woman employed as a bookkeeper in a picture store has stolen a sum of money less than $100 from her employer while in the store in his presence does not justify a police officer in arresting the woman without a warrant, and if by direction of her employer he arrests her without a warrant and locks her in a cell at the police station, she may maintain an action against her employer for false imprisonment. *Robinson* v. *Van Auken*, 161.

FRATERNAL BENEFICIARY CORPORATION.

Inability after *bona fide* attempt of member of fraternal beneficiary corporation to comply with requirements of constitution as to change of beneficiary will not give validity to attempted change of beneficiary not complying with such requirements, see INSURANCE, 8.

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Subordinate lodge of fraternal beneficiary corporation cannot waive provisions requiring certain formalities in changing beneficiaries unless such power is given in constitution of corporation, see INSURANCE, 4.
Fraternal beneficiary corporation cannot, without assent of insured, change its liability on certificate of accident insurance by adopting by-law making new classification of risks after certificate is issued, there being no provision therefor either in corporation's charter or by-laws or in certificate of insurance, see INSURANCE, 9, 10.
For other cases relating to fraternal insurance, see INSURANCE, 11–14.

FRAUD.

St. 1903, c. 415, relating to sales of merchandise in bulk, does not apply to *bona fide* sale by mortgagee, see SALES OF MERCHANDISE IN BULK.
For recovery of money paid under mistake of fact caused by fraud of third person, see CONTRACT, 2, 4, 5.
For suits in equity involving questions of fraud, see EQUITY JURISDICTION, 8–10.

FRAUDULENT CONVEYANCE.

Claim by executor or administrator to land fraudulently conveyed by testator or intestate must be made within five years after his decease, see LIMITATIONS, STATUTE OF.

GASOLINE.

Liability of one keeping gasoline in manner contrary to statute to person injured by explosion thereof, see NUISANCE, 2.

GIFT.

For perfected trust in savings bank deposit created by way of gift although trustee was donor and retained bank book in her possession, see TRUST, 1.

GOVERNOR AND COUNCIL.

Governor required to submit matter to Council only to complete affirmative act, see CONSTITUTIONAL LAW, 2.
Denial of petition for pardon or commutation of sentence by Governor does not require assent of Council, see CONSTITUTIONAL LAW, 3.

GRADE CROSSING ACTS.

1. A mortgagee of land not in possession, who has no other title to the land, cannot recover damages for the taking of the land under St. 1900, c. 453, confirming a report of commissioners abolishing certain grade crossings in Boston, under a petition which alleges that he is the owner of the unincumbered fee, and does not follow the requirements of R. L. c. 111, §§ 112, 113, in regard to petitions by mortgagors and mortgagees. *Taber* v. *City of Boston*, 101.
2. A mortgagee of land not in possession under the mortgage, who has filed a petition for damages for the taking of the land in the abolition of a

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grade crossing, in which he has alleged that he is the owner of the unincumbered fee, cannot prove a possessory title sufficient to maintain the petition by showing that he went upon the land, placed a stone crusher on it, did some work there getting out stone, apparently under a license from the mortgagor, and had negotiations with the mortgagor about buying the property, which after the taking ripened into a bond for a deed of the land. *Taber* v. *City of Boston*, 101.

GREAT POND.

1. By the Colony ordinance of 1641 or 1647 the General Court took away from towns to which no grants had been made all power to act further in reference to great ponds not appropriated to individuals, and appropriated the ponds to the use of the public. *Attorney General* v. *Herrick*, 307.
2. An island in a great pond, insignificant in size, rocky and sterile, worthless for agriculture or grazing, which never has been appropriated to any other than a public use, belongs to the Commonwealth. *Ibid.*
3. Whether there might be in a great pond an island of such size, shape and character that after the passage of the Colony ordinance of 1641 or 1647 the town in which it lay could appropriate it to the use of a private person, *quære*. *Ibid.*

GUARANTY.

1. A guarantor of the performance of the covenants of a lease is not discharged from liability by an agreement between the lessor and the lessee, made without his consent, by which it is agreed that in a pending action for rent due under the lease, defended by the lessee, judgment shall be entered for the plaintiff for the amount claimed and that execution shall not issue until a day named which is earlier than the time when execution would issue in the ordinary course of judicial procedure. *Bothfeld* v. *Gordon*, 567.
2. It is no defence to an action on a guaranty of the performance of the covenants of a lease to recover rent due under the lease and unpaid by the lessee that, when the rent sought to be recovered was due and unpaid and an action against the lessee was pending for its collection, the lessee agreed to surrender possession of the leased property without forcing the lessor to enter and take possession as he might have done under the terms of the lease, and surrendered the property in accordance with this agreement. *Ibid.*

GUARDIAN.

1. A guardian has authority to sell and transfer personal property of his ward without obtaining a license from the Probate Court under the provisions of R. L. c. 145, § 35. That statute merely enables a guardian to apply for a license for his own protection and that of his sureties if he chooses to do so. *Gardner* v. *Beacon Trust Co.* 27.
2. A guardian cannot maintain an action to recover property belonging to his ward. Such action must be brought in the name of the ward. *Mee* v. *Fay*, 40.

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3. If a guardian, who has obtained a license from the Probate Court to sell real estate of his infant ward for the maintenance of the ward, conveys the real estate through a third person to himself for his own benefit, the ward on coming of age may avoid the conveyance. *Sunter* v. *Sunter*, 449.

Power of Probate Court to order sale of real estate by guardian of insane widow, see PROBATE COURT, 1, 2.

Power of Probate Court to authorize investment of insane widow's entire property in mortgage of son conditioned on supporting her, see PROBATE COURT, 8.

HAWKERS AND PEDLERS.

Tea and coffee are not "provisions" within the meaning of R. L. c. 65, § 15, allowing provisions to be sold by hawkers and pedlers without a license. *Commonwealth* v. *Caldwell*, 355.

Provision of R. L. c. 65, § 16, requiring license for peddling articles of growth or production of foreign countries unconstitutional, see CONSTITUTIONAL LAW, 11.

Whether unconstitutionality of that provision affects validity of rest of statute, *quære*, see *Ibid.*

HEALTH, BOARD OF.

See BOARD OF HEALTH.

HOMESTEAD RIGHTS.

Sale of homestead rights of insane widow under guardianship, see PROBATE COURT, 1, 2.

HUSBAND AND WIFE.

1. A wife legally cannot refuse to accompany her husband in a reasonable change of domicil. *Franklin* v. *Franklin*, 349.

2. A promissory note payable to the order of the son of the maker and by him indorsed to the wife of the maker, delivered by the maker to his wife in payment for money borrowed from her by him, the son having no beneficial interest in the transaction, is void in equity as well as at law. *Caldwell* v. *Nash*, 507.

3. Where a wife is joint maker with her husband of a note to pay the husband's debt and gives a mortgage on her real estate to secure the note, the relation of husband and wife does not prevent the enforcement of her right as a surety to have the debt satisfied out of her husband's estate before recourse is had to her real estate. *Browne* v. *Bixby*, 69.

4. If a married woman carries on a farm purchased with her own money, her husband living with her on the farm and acting as her agent, but no certificate for her to do business as a married woman is filed under the provisions of R. L. c. 153, § 10, the personal property of the wife which was employed in the business of carrying on the farm during her lifetime cannot be attached after her death as the property of her husband. *Allen* v. *Clark*, 556.

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Note of wife in payment of or as security for pre-existing debt of husband discharged in bankruptcy, is without consideration, see BILLS AND NOTES, 2, 3.

INFANT.

1. An attorney at law who, at the suggestion of relatives of a minor, acts for the minor in the settlement of the estate of a deceased person in which the minor is interested, not being employed by a probate guardian or a guardian *ad litem* nor by the minor himself, is in the position of a volunteer rendering services which are not necessaries and cannot recover against the minor. *McIsaac* v. *Adams*, 117.
2. Ordinarily services of an attorney at law for an infant are not necessaries unless performed for his personal relief, protection or liberty, see *Ibid.* 119.

INSANE PERSON.

Jurisdiction of Probate Court with regard to estate of insane widow under guardianship, see PROBATE COURT, 1–3.

INSOLVENCY.

1. The authority given to the Court of Insolvency by Pub. Sts. c. 157, § 35, R. L. c. 163, § 44, to expunge claims is without limitation of time, and the power thus unlimited applies to cases of composition. R. L. c. 163, §§ 154, 167. *Caldwell* v. *Nash*, 507.
2. Where in accordance with the terms of a composition with creditors confirmed by the Court of Insolvency assets of the debtor remain in the possession of the assignees after the discharge of the debtor, to secure the payment of the notes given to creditors in pursuance of the composition, it is the duty of the assignees to render an account to the court, and such an account is not filed too late because necessarily after the discharge. In such an account the assignees may be allowed a reasonable compensation for their services under Pub. Sts. c. 157, § 56. *Ibid.*

INSURANCE.

Authority of General Agent.

1. The unrestricted general agent in this Commonwealth of a fire insurance company organized under the laws of another State has authority not only to accept risks and receive proofs of loss but also to adjust and settle losses, and the company is bound by his acts although contrary to special instructions which are unknown to the insured. *Green* v. *Star Fire Ins. Co.* 586.

Authority of Insurance Broker.

2. The authority of an insurance broker acting for one desiring insurance may be found to have ended when a policy for the insurance has been countersigned by the general agent of the company and has been given by him to his clerk for delivery directly to the insured to whom it subsequently is delivered without the intervention of the broker. *Green* v. *Star Fire Ins. Co.* 586.

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Life.

3. Where the certificate of a fraternal beneficiary corporation provides that "a change of beneficiary in any other manner than as directed by the constitution will not be legal or binding on the order," and a provision of the constitution, printed on the certificate, requires for such a change a declaration in writing signed by the member, witnessed by two reputable witnesses and acknowledged before a justice of the peace, or one of certain other officers named, an attempt of a member to change the beneficiary named in his certificate by signing at a hospital during his last illness a declaration on the form approved by the order and acknowledging it before a justice of the peace, but with no other witness, is of no effect, and it is immaterial that the justice of the peace tried to procure the necessary witnesses but failed to do so. *Abbott* v. *Supreme Colony Pilgrim Fathers*, 67.
4. By the constitution of a fraternal beneficiary corporation a change of the beneficiary named in a certificate could be made only by a declaration in writing signed by the member, witnessed by two reputable witnesses and acknowledged before a justice of the peace, or one of certain other officers named. A member during his last illness signed such a declaration and acknowledged it before a notary public, but with no other witness. The declaration was forwarded to the subordinate lodge and was received by it a day or two before the death of the member. The constitution and laws of the order contained no provision authorizing a subordinate lodge or any of its officers to waive any requirement of the constitution and laws. The supreme board of directors knew nothing of the lack of witnesses to the declaration until after the death of the member. *Held*, that there was no evidence of a waiver of the requirement of two witnesses. *Ibid.*

Fire.

5. A policy of fire insurance in the Massachusetts standard form containing the condition that "this policy shall be void . . . if the insured now has, or shall hereafter make, any other insurance on the said property, without the assent in writing or in print of the company," and containing in a rider attached to it a provision "that the assured shall maintain insurance on the property described by this policy to the extent of at least eighty per cent of the actual cash value thereof," becomes void if it is assigned with the assent of the company to one who without the assent in writing or print of the company already has other insurance on the property exceeding with the policy assigned the entire value of the property. *Woolford* v. *Phenix Ins. Co.* 233.
6. A provision in a policy of fire insurance, that the policy shall be void if the insured premises become vacant by the removal of the owner or occupant and so remain vacant for more than thirty days without the assent in writing or in print of the company issuing the policy, cannot be waived by an oral agreement of an agent of the company. *Harris* v. *North American Ins. Co.* 361.

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7. A building in process of construction is not an "unoccupied building" within the meaning of that term included in a list of prohibited risks furnished by a fire insurance company to its agents. *Harris* v. *North American Ins. Co.* 361.

8. A policy of fire insurance in the Massachusetts standard form contained the usual provision that it should be void if the premises thereby insured should become vacant by the removal of the owner or occupant, and should so remain vacant for more than thirty days without the assent in writing or in print of the company. The policy was issued to the owner of a house in process of construction described as a "frame dwelling house" and contained permission "for mechanics to work in and about said premises for thirty days from date," which subsequently was extended for a further period, at the end of which the contractor turned over the house to the owner completed with the exception of water connections for which it was necessary to wait until water pipes were extended in the street on which the house stood. While the owner was waiting for an appropriation to be made by the town for this purpose the house remained empty for more than thirty days, but the owner lived in another house on the same tract of land about one thousand feet from the insured building which was in sight of himself and his family and which he passed daily in going to and from his work. Before the date of the town meeting at which the appropriation for the extension of the water pipes was expected the house was destroyed by fire. In an action on the policy the defences were set up of a forfeiture of the policy by the premises becoming vacant or by an increase of risk. *Held*, that the house had not become vacant by the removal of the owner or occupier within the meaning of the policy, and that the question whether allowing the house to remain vacant after the mechanics left while the plaintiff was exercising the supervision shown by the evidence increased the risk of fire was an issue of fact which properly should be submitted to the jury, if the defendant wished to go to the jury on this branch of the defence. *Ibid.*

One insured under policy providing for payment in case of loss to mortgagee can maintain action on policy if mortgagee assents although after action brought, see PRACTICE, CIVIL, 3.

Accident.

Classification of risks.

9. A provision in an accident insurance certificate issued by a fraternal beneficiary association, "that if the insured is injured while engaged temporarily or otherwise in any occupation or exposure classed by this association as more hazardous than that here given, his insurance and weekly indemnity shall only be so much as the premium paid by him will purchase at the rate fixed for such increased hazard," refers only to the classification of risks in force at the time the certificate was issued, and gives the association no right by a new classification of occupations to change the amount of insurance to which a member is entitled. *Morse* v. *Fraternal Accident Association*, 417.

10. In an action on a certificate issued to the plaintiff's intestate by a fraternal beneficiary association insuring against accident, it appeared that

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the certificate contained a provision, "that if the insured is injured while engaged temporarily or otherwise in any occupation or exposure classed by this association as more hazardous than that here given, his insurance and weekly indemnity shall only be so much as the premium paid by him will purchase at the rate fixed for such increased hazard," that the plaintiff's intestate when the certificate was issued to him was a stage driver, an occupation which belonged to a class of risks entitling the plaintiff to recover $1,250 on the certificate, that later the plaintiff's intestate ceased to be a stage driver and became a passenger brakeman on a railroad, that he notified the defendant's secretary of the change, and received a letter from the defendant's secretary and treasurer informing him that as a passenger brakeman he was entitled to the same amount of insurance as before, that several years later the defendant adopted a new classification "of occupations and exposures, to be used as the manual or classifications of occupations and exposures of this association for all members now insured or to be hereafter insured in this association," that by the new classification a passenger brakeman was put in a class of greater risk and, if the provision applied to the certificate of the plaintiff's intestate, the amount which the plaintiff could recover was reduced to $250, that the defendant's secretary and treasurer had written and mailed a letter addressed to the intestate notifying him of the change and requesting that his certificate be returned to the defendant for rewriting so that it might conform to the new classification. It did not appear that this letter ever was received by the intestate, who did not return his certificate and continued to pay the same assessments and dues as before. The certificate contained a provision under which the defendant could cancel it at any time on making certain payments to the holder. *Held*, that the provision of the certificate above quoted must be construed as referring to the classification in force at the time the certificate was issued, and gave the defendant no right by a subsequent change of classification to reduce the amount of insurance of the plaintiff's intestate; that, even if it had appeared that the defendant's letter of notification of the change of classification had been received by the plaintiff's intestate, it could be found in spite of his failure to answer the letter that he did not assent to the change; and that the plaintiff was entitled to recover the full amount of the insurance. *Morse* v. *Fraternal Accident Association*, 417.

Proof to satisfaction of directors.

11. In an action on a certificate issued by a fraternal beneficiary association, agreeing to indemnify the plaintiff against disability caused by external, violent and accidental means, and containing a provision that the indemnity shall be paid "within sixty days from the receipt by its board of directors of proof satisfactory to said board of the particular disability suffered by said member," it is a question for the jury whether the plaintiff furnished proof which reasonably should have satisfied the directors. *Noyes* v. *Commercial Travellers' Eastern Accident Association*, 171.

Plaintiff not confined to preliminary statement of claim.

12. In an action on a certificate issued by a fraternal beneficiary association, to recover an indemnity for the loss of a leg by a railroad accident, if it

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appears that the plaintiff seasonably filed with the defendant a claim for indemnity, as required by the terms of the certificate, containing a sufficient statement of his claim, in proving his case in court he is not to be limited to the details of fact or evidence contained in his preliminary statement. *Noyes* v. *Commercial Travellers' Eastern Accident Association*, 171.

Excepted accidents.

13. In an action on a certificate issued by a fraternal beneficiary association, agreeing to indemnify the member against disability caused by external, violent and accidental means, but excepting accidents caused by the member's voluntary exposure of himself to unnecessary danger, accidents which the member by the exercise of ordinary care might have prevented, accidents to which his own negligence contributed, and accidents caused by disease, if the defendant relies on any of these exceptions as a defence to the plaintiff's claim, the burden is on him to show that the accident is within the exception, and the plaintiff, having proved that his disability was caused by external, violent and accidental means, is not called upon to disprove the existence of facts which would bring his case within the exceptions. *Ibid.*

14. In an action on a certificate issued by a fraternal beneficiary association, agreeing to indemnify the member against disability caused by external, violent and accidental means, but excepting accidents caused by the member's voluntary exposure of himself to unnecessary danger, accidents which the member by the exercise of ordinary care might have prevented, accidents to which his own negligence contributed, and accidents caused by disease, if there is evidence that the plaintiff, a man seventy-eight years of age, was on the platform of a railroad station, and, as his train approached, walked forward on the platform near the side of the train before it stopped, intending to take a forward car, when suddenly without any apparent cause his right foot gave way and he fell in such a way that his left foot was crushed by the train, the questions whether the plaintiff was negligent, and whether the sudden giving way of the foot without apparent cause was a disease are for the jury. *Ibid.*

Sprinkler.

15. A manufacturer occupying the second floor only of a five story building equipped throughout with the Grinnell automatic sprinkling system sued on a policy insuring him "against all direct loss or damage caused by water discharged, or that may leak from the automatic sprinkler system known as the Grinnell, now erected in or on that portion of the building occupied by the assured, described as follows: brick building situate in extreme rear of No. 2–20 Washington Street, Haverhill." It appeared that the damage for which the plaintiff sought to recover was caused by water from a broken sprinkler on the fifth floor of the building, which was occupied by another manufacturer. *Held*, that the plaintiff could not recover, as the policy should be construed to insure only against damage from leakage of the sprinkler erected on the portion of the building occupied by the plaintiff. *Bottomley* v. *Royal Insurance Co.* 73.

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ISLAND.

Ownership of island in great pond, see GREAT POND, 1–8.

JUDGMENT.

1. A judgment on the merits is a bar to an action between the same parties for the same cause of action not only on all the issues actually tried in the case but on all which might have been tried in it. *Cotter* v. *Boston & Northern Street Railway*, 302.

2. A judgment for the defendant in an action brought by a girl less than four years of age against a street railway company for injuries from being struck by an electric car of the defendant through the negligence of its servants and agents, rendered on the ground that the plaintiff and her parents were not in the exercise of due care, is a bar to a subsequent action between the same parties for the same injuries, in which the declaration alleges wilful negligence on the part of the defendant and wanton and reckless conduct on the part of its servants and agents which would make the defendant liable although the negligence of the plaintiff and of her parents might have contributed to her injuries. *Ibid.*

3. A judgment entered upon a general verdict for the plaintiff in an action where the declaration contains several counts, each for a cause of action excepted from the operation of a discharge in bankruptcy, is not barred by such discharge. *McChristal* v. *Clisbee*, 120.

On bill for instructions by trustee as to distribution under clause of will previous decree of Probate Court on former bill for instructions interpreting same clause conclusive as to distribution made under it but not as to construction of clause for subsequent distributions, see TRUST, 6.

KEROSENE.

Liability of one keeping kerosene in manner contrary to statute to person injured by explosion thereof, see NUISANCE, 2.

Judicial knowledge that kerosene is product of crude petroleum, see EVIDENCE, 1.

LACHES.

See EQUITY JURISDICTION, 1, 2; TRUST, 6.

LANDING PLACE.

Under Rev. Sts. c. 24, § 61, Gen. Sts. c. 46, § 1, Pub. Sts. c. 54, § 1, R. L. c. 53, § 1, no right to maintain a private building on a public landing place the boundaries of which can be made certain can be acquired by a possession of less than forty years. Here in the case of a boat house it was held that the evidence justified a finding that for many years before the limit of time had run there had been a substantial abandonment of the use to which the building formerly had been put, and that there was nothing to prevent the removal of the boat house as a nuisance. *Gifford* v. *Westport*, 323.

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LAND COURT.

Procedure in Land Court, see PRACTICE, CIVIL, 14, 15.

LANDLORD AND TENANT.

Rights of Lessee in Show Window.

1. A lease of a store on the ground floor of a building on a city street, used by the lessee as an art store, with a show window the front of which is on the street and the side of which is on an open vestibule used as the entrance to a staircase leading to the floors above and controlled by the landlord, the side of the window on the vestibule being of much value to the lessee and having constituted a material element in fixing the amount of rent to be paid, gives the lessee the right to a full and unobstructed use of the window, and if the tenant of rooms on the second floor of the building under a license from the landlord places a show case in the vestibule so as to obstruct a full view of the lessee's window, the lessee has a *right* to remove the show case, and a bill in equity by the proprietor of the show case to enjoin its removal will be dismissed. *Whitehouse* v. *Aikin*, 468.

Rights of Lessee against Third Person.

2. A lessee of greenhouses can recover for their injury from an explosion caused by the fault and negligence of another, although his lease contains a provision under which he is not bound to repair damage caused by fire or other unavoidable casualties. *Moeckel* v. *Cross & Co.* 280.

Guarantor of Lease.

Liability of guarantor of performance of covenants of lease as affected by acts and agreement of lessor and lessee, see GUARANTY, 1, 2.

LARCENY.

Larceny in a building under R. L. c. 208, § 20, must be of money or property in the custody of the building, see *Robinson* v. *Van Auken*, 161, 167.

Reasonable ground for believing that one has stolen sum less than $100 entrusted to his possession does not justify arrest without warrant, see FALSE IMPRISONMENT.

LEGACY.

See DEVISE AND LEGACY.

LIBEL AND SLANDER.

Libel.

1. A publication in a newspaper charging the chairman of the board of police of a city with being the head of the "police rum combine," with furthering by unfair means and perhaps by bribery and for improper purposes the election of a certain candidate for superintendent of streets described as corrupt and the advocate of "all sorts of schemes to rob the taxpayers," may be found to be libellous, and the fact that the publication

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related to the superintendent of streets as a candidate for public office is no defence to an action by the chairman of the board of police who was not such a candidate. *Dow* v. *Long*, 138.

2. A publication in a newspaper stating that the chairman of the board of police of a city is furthering the election of a certain candidate for superintendent of streets, that he "could not select in the entire city a person who is better adapted for the purpose of robbing the taxpayers," and that from the plaintiff's "standpoint he will make an ideal superintendent of streets," as set forth in the declaration in an action for libel brought by the chairman of the board of police, was held on demurrer to be libellous. *Ibid.*

3. In an action for libel, proof that a complaint was entered against the plaintiff charging him with larceny of less than $100 from a certain town, and that a warrant was issued on that complaint, does not prove the truth in substance of a statement published in the defendant's newspaper that the plaintiff had been arrested, that he was accused of taking town money for work he did not do, and that he was placed in custody on a certain evening and soon bailed, that according to the allegations of the complaint the plaintiff received pay for work he did not perform and charged the town and was paid for the use of a team on a certain day when the team was not used by the town, that it is understood that the amount involved is less than $100, and that whether any attempt to name any other date will be made on the part of the government is not stated. *Monaghan* v. *Globe Newspaper Co.* 394.

Slander.

4. In an action for slander in charging the plaintiff with larceny of money belonging to the defendant, it is not necessary to prove that the exact words alleged in the declaration were spoken. It is enough to prove that such of the words as are necessary to constitute a charge of larceny were spoken in substance by the defendant. *Robinson* v. *Van Auken*, 161.

5. In an action by a bookkeeper against her employer for slander in charging her with larceny of money in the presence of a police officer called by him to arrest her, the communication is privileged only if made in good faith and without malice, and if it appears that the defendant was angry when he made the charge, it is a question of fact for the jury whether he was acting in good faith or in part from malice. *Ibid.*

LIMITATIONS, STATUTE OF.

The provision of R. L. c. 146, § 2, that no claim by an executor or administrator "by entry or by action to land fraudulently conveyed by the deceased shall be made unless within five years after the decease of the grantor," is a statute of limitation which bars all actions brought after the expiration of the prescribed time. R. L. c. 202, § 31, has no application, as it relates only to extensions of the limitations imposed by c. 202. *Tyndale* v. *Stanwood*, 513.

Right to maintain encroachment on public landing place not gained by less than forty years adverse user under claim of right, see LANDING PLACE.

No limitation of time to power of Court of Insolvency to expunge claims, see INSOLVENCY, 1.

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LOON ISLAND.

Ownership by Commonwealth of Loon Island in Chebacco Pond in town of Hamilton established, see GREAT POND, 1–3.

LORD'S DAY.

Gathering cranberries on the Lord's day when there is an unusually large crop but no sudden and unexpected emergency is not a work of necessity within the meaning of St. 1904, c. 460, § 2. *Commonwealth* v. *White*, 578.

LOWELL.

In action by clerk of board of police against city of Lowell, surplus of appropriation for police department held to be applicable to plaintiff's salary, and attempt to restrict that salary held to be beyond power of city council, see MUNICIPAL CORPORATIONS, 10.

MARRIAGE AND DIVORCE.

1. The wife of a skilful mechanic, both husband and wife being natives of England where they were married and where several children were born to them, who refuses to accompany her husband when he moves to America "to better his condition in life," and who on two occasions afterwards, when he has sent her money sufficient to bring her and the children then with her in a comfortable manner to America, again refuses to come, can be found to be guilty of utter desertion which will justify the granting of a divorce to her husband on this ground under R. L. c. 152, § 1. *Franklin* v. *Franklin*, 349.

2. Under R. L. c. 152, § 33, a decree for alimony may be revised and altered after the expiration of the period during which the payment of alimony was ordered if there has been such a change of circumstances as to warrant it. *Smith* v. *Smith*, 573.

3. A decree for alimony directed a husband who was granted a divorce to pay to his former wife "as alimony the sum of $25 per week for two years from the date of the decree *nisi*." After the expiration of the two years the former wife filed a petition for additional alimony alleging inability to support herself by reason of ill health and bodily weakness. The court made a decree in substance as follows: "The form of the former decree indicates that the judge intended that the alimony then ordered to be paid should be in full for all alimony to which the petitioner was entitled, but this is not entirely clear, and by reason of the present condition of the petitioner it is ordered that the respondent pay to the petitioner $15 per week for one year." *Held*, that the order allowing further alimony must be construed to include a finding that there was a change in the circumstances of the petitioner since the former decree was made. *Ibid.*

Right of libellant in libel for divorce to have libel dismissed without prejudice for want of prosecution, see PRACTICE, CIVIL, 25.

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MARRIED WOMAN.

See HUSBAND AND WIFE; MARRIAGE AND DIVORCE.

MASTER AND SERVANT.

See AGENCY; ASSAULT AND BATTERY, 1; NEGLIGENCE, 4–9.

MECHANIC'S LIEN.

1. On a petition to enforce a mechanic's lien, where it is admitted that the petitioner is entitled to enforce his lien and the only question open is whether certain notes given to the petitioner by the person for whom the work was performed, which were not received in payment, were so dealt with by the petitioner that he received benefit from them and therefore that the respondent should be credited with the amount so received by the petitioner, if it appears that the petitioner negotiated the notes and did not take them up until after the filing of his petition, but that afterwards, the maker having become a bankrupt, the petitioner took up the notes and produced them before an auditor to whom the case had been referred and before the court to be cancelled, the petitioner is not required to give credit for the amount represented by the notes. *Moore* v. *Jacobs*, 424.
2. On a petition to establish a mechanic's lien for work and labor performed and furnished in the erection of a building under a contract with the contractor who built it, if it appears that the petitioner failed to perform his contract, that the contractor suffered loss from this cause and that the work furnished by the petitioner was of no value to the contractor, a jury is not justified in finding for the petitioner. *McLaughlin* v. *Sayle*, 583.
3. At the hearing upon a petition under R. L. c. 197, to enforce a mechanic's lien it appeared that the contract price for the work which the petitioner was to do including labor and materials was a round sum of $200. The jury found that the petitioner did not fully perform his contract, that by reason of this failure $25 should be deducted from the contract price, and that the value of the labor and material furnished was $175. *Held*, that these findings were consistent with a finding that the petitioner attempted in good faith to perform his contract and substantially performed it, and that, the petitioner having received already $50 on account, an order of the presiding judge that the lien be established for the sum of $125 should be sustained. *Bergfors* v. *Caron*, 168.
4. A bond given under R. L. c. 197, § 28, to dissolve a mechanic's lien, approved by a master in chancery without causing an appraisal to be made of the property to be released, as required by R. L. c. 167, § 121, where the parties have not agreed upon the value of the property, has no effect to dissolve the lien. *Rockwell* v. *Kelly*, 439.

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METROPOLITAN PARK COMMISSION.

Damages may be recovered for injury to land from taking of adjoining land by metropolitan park commissioners although no land of petitioner was taken, see DAMAGES, 4.

Rules of metropolitan park commission affecting access to lands on boulevard in their care are valid if reasonable; and, where facts are in dispute, question of reasonableness may be submitted to jury, see PARKS AND PARK COMMISSIONERS; PRACTICE, CIVIL, 11.

MILL ACT.

For complaint under Pub. Sts. c. 190, involving question of damages from respondent's wrongfully maintaining dam at improper height, and seeking to have proper height of dam determined, see WATER RIGHTS.

Procedure under mill act not sole or proper remedy for one whose cranberry bog has been flowed unlawfully by another riparian owner, see PRACTICE, CIVIL, 4.

MILLS AND MILL OWNERS.

For construction of agreement between mill owners who are adjoining riparian proprietors on natural watercourse, see CONTRACT, 6.

MINOR.

See INFANT.

MISTAKE.

Right to recover money paid under mistake caused by fraud of third person, see CONTRACT, 2, 4, 5.

MORTGAGE.

Of Real Estate.

Mortgagee of land unable to prove possessory title sufficient to maintain petition as owner for damages for taking in abolition of grade crossing by showing that he went upon land, did some work there with stone crusher, apparently under license from mortgagor, and had negotiations with mortgagor which after taking ripened into bond for deed, see GRADE CROSSING ACTS, 2.

Mortgagee of land not in possession cannot, without complying with requirements of R. L. c. 111, §§ 112, 113, maintain petition for damage from abolition of grade crossing, see GRADE CROSSING ACTS, 1.

For equitable mortgage of real estate, see EQUITY JURISDICTION, 5.

Of Chattels.

1. A chattel mortgage of a stock in trade, declared to apply to all future acquired stock which the mortgagor shall have in his business, given in good faith for a valuable consideration, operates as an executory agreement which subjects after acquired goods to the lien of the mortgage if the mortgagee takes possession of the goods before the rights of third persons

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intervene. The existence of the claim of a creditor without attachment or seizure on execution is not such an intervention. *Wasserman* v. *McDonnell*, 326.

2. If by the terms of a chattel mortgage five days' notice in writing of a foreclosure sale is required, and it appears that a notice either of four or five days was given, although the mortgagor may have had the right to set aside the sale for insufficient notice, yet if he has assented to the sale and treated the notice as good, the irregularity does not affect the title of a *bona fide* purchaser at the sale as against a creditor of the mortgagor. *Ibid.*

3. In the foreclosure of a chattel mortgage under a power of sale contained in the mortgage it is not necessary that a notice of the foreclosure and an affidavit of the service thereof should be recorded. *Ibid.*

St. 1903, c. 415, in regard to sales of merchandise in bulk does not apply to ordinary chattel mortgage of stock in trade, see SALES OF MERCHANDISE IN BULK.

MUNICIPAL CORPORATIONS.

By-Laws and Ordinances.

1. Under the charter of the city of Taunton, St. 1882, c. 211, the provision, contained in section 1 of chapter 12 of the ordinances of that city, that the mayor and aldermen shall annually appoint policemen who shall continue in office until their successors are appointed and qualified, is valid. *Lahar* v. *Eldridge*, 504.

Powers, Duties, and Liabilities.

2. A town lawfully can expend money to reimburse a tree warden for money expended by him in defending unsuccessfully a suit brought against him by the town for removing guide boards from shade trees in the village square placed there by authority of the town, if in doing the acts complained of and in defending the suit the tree warden was acting in good faith in the performance of what he believed to be a public duty. *Hixon* v. *Sharon*, 347.

3. The city of Boston in operating a ferry with established tolls for the transportation of passengers between the mainland of that city and East Boston under St. 1869, c. 155, is liable as a common carrier to a passenger on a ferryboat owned and operated by it who was injured through the negligence of one of its servants, and the fact that the business of operating the ferry is managed in such a way as not to be profitable to the city is immaterial. *Davies* v. *City of Boston*, 194.

4. A gift was made to a town of a building for a library and of a fund which was to accumulate for twenty years, with a provision that after that time the town by a vote of two thirds of its legal voters might act as they thought best for the good of the people of the town in regard to selling the library building and adding the proceeds to the capital of the fund and the erection of a new building. A board of trustees was provided for to whom the donor left "the details of the management and regulation" of the trust. After the expiration of the twenty years, the town, by a vote of

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two thirds of its legal voters, accepted the gift of a certain lot of land as a site for a new library building and voted that the trustees be instructed to erect a library building on the lot at a cost not to exceed $15,000. The trustees in good faith made a contract for the erection of a library building to cost less than $15,000 and later made a supplemental contract including extras, by which the whole cost of the building was to be $16,505. The town at its next annual meeting by a two thirds vote accepted and approved the report of the trustees which stated these contracts and payments amounting to $10,000 on account of them. *Held*, that the town by the terms of the gift had authority not only to select the site for the new building but also to fix the cost of it, and that although under the first vote of the town limiting the cost to $15,000 the second contract of the trustees to pay more than $15,000 for the building did not, when made, bind the town, yet the subsequent vote ratified this contract and made it as binding on the town as if originally authorized. *Nelson* v. *Inhabitants of Georgetown*, 225.

City council of Lowell has no power to reduce salary of clerk of board of police below sum fixed by that board under city charter, and where enough money has been appropriated to pay full salary city is liable for it, see *post*, 10.

Liability of municipal corporation for defect in highway, see WAY, 5, 6.

Officers and Agents.

5. R. L. c. 11, § 186, does not confer on the aldermen of cities and the selectmen of towns, nor in Boston upon the board of election commissioners, the right to place a voting booth in the travelled part of a public street. *Haberlil* v. *Boston*, 358.

6. A vote of the board of aldermen of the city of Boston granting permission to the board of election commissioners to place voting booths in the streets of that city does not confer the right to place a voting booth in the travelled part of a public street, the aldermen having no power to give such a right. *Ibid.*

7. A city engineer has no authority to waive provisions in a contract with the city for the furnishing of work and materials, that any claim of the contractor for loss or extra cost shall be presented within a certain time in an itemized bill with vouchers and a copy of the order under which the cost was incurred, and that where these requirements have not been complied with no sum shall be allowed for extra work or extra materials without the approval in writing of the mayor. *Cashman* v. *City of Boston*, 215.

8. A taking by the street commissioners of the city of Boston under St. 1897, c. 426, by an order locating a new channel for the Neponset Avenue branch of Stony Brook, of "the right to maintain said new channel and other sewerage works" in the land described, includes the right of using the channel for a house sewer. *Evans* v. *City of Boston*, 525.

9. St. 1904, c. 314, providing that a person holding office or employment classified under the civil service rules of the Commonwealth shall not be removed except for just cause and for reasons specifically given in writing,

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does not affect the expiration of the term of employment of a police officer appointed under an ordinance of a city authorized by the city charter which prescribes the length of the term. *Lahar* v. *Eldridge*, 504.

10. In an action by the clerk of the board of police of the city of Lowell against that city to recover a balance of $300 alleged to be due him as salary, it appeared that under the revised charter of that city, St. 1896, c. 415, the board of police, having power to appoint a clerk of the board and to fix his salary, appointed the plaintiff to that office and fixed his salary at $1,800 per year, that the city council, having control of appropriations, voted that "the joint committee on appropriations shall determine, in their annual appropriations, the amount to be allowed for clerical assistance," and in an appropriation of $4,700 for salaries of the police board and the clerk of the police board provided only $1,500 for the plaintiff's salary for the year. Section 8 of the revised charter provides that "no sum appropriated for a specific purpose shall be expended for any other purpose; and no expenditure shall be made and no liability be incurred by or on behalf of the city until the city council has duly voted an appropriation sufficient to meet such expenditure or liability, together with all prior unpaid liabilities which are payable therefrom," with an exception not material. In addition to the appropriation above named the city council appropriated $127,806 for salaries and labor of the police department, which subsequently was increased by $225, and there were receipts from services of officers, creating a surplus of $1,470 in the appropriation after paying for all labor and salaries, exclusive of the balance claimed by the plaintiff. *Held*, that, the plaintiff's salary being one of the salaries of the police department, the surplus of the appropriation properly was applicable to its payment, and that the attempt in the appropriation to restrict the plaintiff's salary to $1,500 was of no effect, being beyond the power of the city council. *Smith* v. *Lowell*, 332.

Powers of and proper procedure by board of health of municipality in abatement of nuisance, see BOARD OF HEALTH, 1–3.

NECESSARIES.

The services of an attorney at law performed for an infant in connection with the settlement of an estate in which the infant is interested as beneficiary are not necessaries, and ordinarily the services of an attorney at law for an infant are not necessaries unless performed for the infant's personal relief, protection or liberty. *McIsaac* v. *Adams*, 117.

NEGLIGENCE.

Child playing on Highway.

Girl six years and eight months of age playing on highway, if in exercise of degree of care reasonably to be expected of her, can maintain action against person through whose negligence she is injured, see *post*, 39.

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Invitation to enter Premises.

1. In an action by a teamster against the proprietor of a chair factory for injuries from falling through an open scuttle in a passageway on the second floor of the defendant's factory, it appeared that the plaintiff's employer had a contract to cart and deliver the defendant's goods, that the plaintiff was accustomed to go to the defendant's office on the ground floor of the factory and there inquire for the shipper, John, to find out whether there were any goods to be taken, that if the shipper was not there the foreman or the manager often would tell him that he would have to see John, and sometimes would say he was upstairs, whereupon the plaintiff would go upstairs to see the shipper unless he came down before the plaintiff went up, that on the day of the accident the plaintiff at such a suggestion of the manager went upstairs in search of John, fell through the open scuttle in the passageway, and was injured. The defendant contended that the plaintiff in going into the second story of the defendant's building was a trespasser or a mere licensee, and so was not entitled to recover. *Held*, that whether there was an invitation to the plaintiff from the defendant's manager to go to the second story and the plaintiff accordingly was justified in going there, was a question of fact for the jury. *Mallock* v. *Derby*, 208.

Due Care of Plaintiff.

2. There is no absolute rule of law that a person to exercise due care must look and listen before crossing the track of an electric street railway. *Finnick* v. *Boston & Northern Street Railway*, 382.

Of girl six years and eight months of age playing on highway, see *post*, 40.

Of passenger moving on running board of crowded open electric car to get bundle, see *post*, 16.

Of woman passenger not taking nearest seat on entering closed electric car, see *post*, 14.

Of woman traveller using street recently undergoing repairs thinking repairs completed, see *post*, 34.

Of freight brakeman in crowded freight yard of manufactory, see *post*, 42.

Of employee of railroad company in removing skid leaning against pile of cotton bales in freight house, see *post*, 5.

Of one driving milk wagon on street railway track at time when cars are not ordinarily run, see *post*, 21.

Of one driving on street railway track two horse caravan heavily loaded with piles extending forward over horses' heads, see *post*, 22.

Of one loading railroad iron into car for his employer and using platform not known to him to be defective, see *post*, 6.

Of one leaving horse attached to delivery wagon fastened to weight in front of his store, see *post*, 37.

Imputed Negligence.

3. A girl six years and eight months of age living with her father and her grandmother can be allowed to leave the house and go upon a highway un-

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attended without negligence being imputed as matter of law to her father or her grandmother if she is injured. *Slattery* v. *Lawrence Ice Co.* 79.

Employer's Liability.

Assumption of risk.

4. An employee making use in the course of his employment of a freight elevator maintained by his employer assumes the risk of an injury occasioned by the walls of the elevator well being covered with plaster instead of a harder material. *McDonald* v. *Dutton*, 391.

Employee who goes to work upon defective platform constructed by his employer's superintendent not having seen its construction and not knowing of defect does not assume risk of injury from this cause, see *post*, 6.

Superintendence.

5. In an action against a railroad company by a workman employed in its freight house for personal injuries, it appeared that it was a part of the plaintiff's duty to open cars for unloading and to place a skid as a bridge between the car to be unloaded and the freight house, that in seeking a skid for this pupose he went into the freight house and took one that was leaning against a row of cotton bales, and as he took it away the bales fell over on him, causing the injuries. It was contended by the plaintiff that the defendant's foreman was negligent in allowing the bales to be placed on end leaning against each other without a bulkhead of horizontal bales to support them, but there was nothing to show who directed that the bales should be placed where they were or how long they had been in the position in which they were when they fell. *Held*, that the plaintiff, in taking the skid away without looking to see how it stood against the bales and what effect its removal would have, was not in the exercise of due care, and further, that, assuming that for the foreman knowingly to have left the bales in such a position that the removal of the skid might cause them to fall would have been evidence of negligence, there was no evidence that the foreman knew of the position of the bales, so that a verdict for the defendant was ordered properly. *Cahill* v. *Boston & Maine Railroad*, 421.

6. In an action by a workman employed by a corporation, in the shipping of some old railroad iron, against his employer, for injuries from a fall caused by the slipping of a sleeper forming part of a temporary platform on which he was standing while pushing a rail into a car which he was assisting in loading, it appeared that the platform was made of four sleepers weighing about one hundred and eighty pounds each, the lower two laid at right angles with the track and the upper two laid parallel with the track and near it, and that the sleepers were not spiked together. It further appeared that the platform was constructed under the direction of one who could have been found to have been acting as the defendant's superintendent, and the plaintiff testified that he had nothing to do with putting the sleepers in position and did not see the construction of the platform, heard no orders given about it, and did not know that the top sleepers were not spiked down, supposing until the time of the accident that they

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were secure. *Held*, that the jury were warranted in finding that the platform, although temporary in its nature, was an appliance provided by the defendant, through its superintendent, for the use of the men who were engaged in loading the cars, and that the questions whether the superintendent was negligent in not fastening the sleepers together, whether the plaintiff assumed the risk of the accident, and whether he was in the exercise of due care, were for the jury. *White* v. *William H. Perry Co.* 99.

Defective machinery and appliances.

7. In an action by an operator of a carding machine against his employer for alleged negligence in maintaining the machine in a defective condition, whereby pellets of hard, lumpy cotton were formed and thrown against the door of a cylinder so as to open the door when it should have been kept closed, thus allowing the plaintiff's hand to pass through it and be injured, if the defendant contends that by the operation of a principle of physics the pellets of cotton must have been thrown by centrifugal force downward, parallel to, past and not against the door, and the plaintiff introduces the evidence of experts who testify that in such a machine and under the circumstances shown the pellets would strike the door, and if also two witnesses testify that they have seen and heard pellets striking and opening the doors of such machines, the question of the defendant's negligence is for the jury. *Lack* v. *Hargraves Mills*, 56.

8. The proprietor of a freight elevator which passes between a sub-basement and the sidewalk of a street through an elevator well with a stone coping at the top and its sides below the coping covered with plaster which is scratched and banged in the operation of the elevator is not negligent toward his employees who make use of the elevator in failing to repair a hole in the plaster just below the coping five or six inches wide, two and a half inches high and from an inch to an inch and a half deep, in which the toes of an employee are caught under the coping as the elevator is ascending. *McDonald* v. *Dutton*, 391.

Platform, temporary in its nature, constructed by superintendent of one loading railroad iron into car for use in such loading held to be an appliance furnished by employer, see *ante*, 6.

Fellow servant.

9. A street railway company is not liable to a car cleaner employed in one of its car houses for injuries from falling through an opening in the floor of the car house from which an iron ventilating grating had been removed by another of its car cleaners who carelessly neglected to replace it. *Horrigan* v. *Boston Elevated Railway*, 577.

Liability of Owner of Machinery to Servant of Contractor using it.

10. R. L. c. 106, § 76, is intended to preserve but not to enlarge the common law liability of the owner of machinery to a servant of a contractor employed by the owner for an injury caused by a defect in the machinery due to the owner's negligence or to that of some person entrusted by him with the duty of keeping it in proper condition. *Sullivan* v. *New Bedford Gas & Edison Light Co.* 288.

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11. The owner of machinery, who employs a contractor to do certain work by means of the machinery, is not liable for an injury to an employee of the contractor caused by an obvious imperfection in the machinery if it is not out of repair. *Sullivan* v. *New Bedford Gas & Edison Light Co.* 288.

12. In an action by a coal shoveller for injuries from a lump of coal falling on him while employed by a stevedore in trimming coal in the hold of a barge at the defendant's wharf where the coal from the barge was being unloaded by an automatic device which tipped over a tub at the end of the arm of a derrick and after emptying the coal swung the tub back right side up to the hold of the vessel for another load, it appeared that the plaintiff was hired by the stevedore on the day of the accident and that he was injured the first time that the tub swung back after he went to work. There was evidence warranting a finding that the automatic apparatus was not balanced properly and for this reason the tub did not always come back latched and with its mouth up after discharging its load, and that this defect was the cause or a contributing cause of the falling of the lump of coal on the plaintiff, but there was no evidence that there was anything out of repair or that the apparatus was not in its usual condition. *Held*, that the plaintiff could not recover, the defendant having been under no duty to him to remove the obvious imperfections of the apparatus which it invited him to use. *Ibid.*

Street Railway.

Injury to passenger.

13. If a person boards a street car, which has stopped to allow another person to alight, erroneously supposing that it is going to his destination, and, on the conductor calling out "This car goes to the stables only," tries to alight from the car and is injured by its suddenly starting, he cannot maintain an action for his injuries against the company operating the car if it has exercised ordinary care, because the company has not accepted him as a passenger at the time of the accident, and he himself has abandoned the intention of becoming a passenger on hearing the announcement made by the conductor. *Robertson* v. *Boston & Northern Street Railway*, 108.

14. In an action by a woman against a street railway company for injuries from being thrown down by the sudden starting of a closed electric car with a violent and unusual jerk while the plaintiff who had entered the car as a passenger had proceeded up the passageway of the car five or six feet without taking a seat, the jury may find that the plaintiff was exercising ordinary care in proceeding toward the front of the car even if she passed an empty seat which she could have taken. *Weeks* v. *Boston Elevated Railway*, 563.

15. It is no evidence of negligence on the part of the conductor of a closed electric car that while a woman passenger of ordinary strength and health who had entered the car was proceeding on her way to a seat he gave the signal for starting the car without waiting for her to be seated and without notifying her that he was about to give the signal. *Ibid.*

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16. A passenger on a crowded open electric car who, while moving along the running board toward the rear of the car to get a bundle from under a seat before alighting, is struck on the head by a pole of the railway company, that day negligently placed so as to lean toward the track, may be found to be in the exercise of due care. *Mason* v. *Boston & Northern Street Railway*, 255.
17. A street railway company may be found to be negligent in replacing an old pole standing near the inner rail on a curve of its track with a new pole which, instead of being erect like the old one, leans toward the track, so that the head of a passenger who is moving along the running board of an open electric car facing the rear comes in contact with it. *Ibid.*
18. In an action against a street railway company by a passenger injured in jumping from a car of the defendant standing on a turnout when it was about to be run into by another car of the defendant which had entered the turnout, it was admitted that the plaintiff was in the exercise of due care, and, on the issue of the negligence of the motorman of the moving car, it appeared that shortly before the accident the switch was set right and was changed by a mischievous boy, that the motormen had been warned by the superintendent of the defendant to have their cars under control when approaching a switch, and the motorman of the moving car testified that it was his practice "when approaching a switch to slow down pretty well and steady his car; that on this occasion he did not notice that the switch was open until he was within twenty feet of it." He admitted that the collision of the two cars took place eighty or ninety feet after he passed the switch, the motorman of the other car putting it at eighty or a hundred feet. The motorman of the waiting car saw the approaching car fifteen hundred feet away while the motorman of the moving car did not appear to have seen the car on the turnout until he passed the switch. There was contradictory evidence on the question whether the rails on the turnout were slippery. *Held*, that there was evidence of negligence on the part of the motorman of the moving car to submit to the jury. *Jordan* v. *Old Colony Street Railway*, 330.

Injury to person on highway.

19. There is no absolute rule of law that a person to exercise due care must look and listen before crossing the track of an electric street railway. *Finnick* v. *Boston & Northern Street Railway*, 382.
20. A motorman running a special electric car in the early morning before daylight along a track where no regular cars run at that hour, the electric headlight according to his own testimony throwing a pencil of light for about a thousand feet about eight feet wide which shut out from his view objects outside of its ray, going at a high rate of speed without sounding his gong at cross streets at a time when persons ordinarily using such streets would not expect a car to be on the track, can be found to be negligent, and the railway company employing him can be found to be liable to a milkman whose wagon after coming from a cross street is struck from behind with great violence by the special car. *Ibid.*

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21. In an action by a milkman against a street railway company for injuries to the plaintiff and his horse and wagon from being run into from behind by a car of the defendant, it appeared that the plaintiff was driving in his milk wagon in the early morning before daylight along his regular route and came from a cross street into a street on which were tracks of the defendant, that his wagon was struck from behind with great violence by a special car of the defendant running at a high rate of speed, that the plaintiff had driven over the milk route for ten years and during that time never had seen a car on the tracks at that place at the hour that the accident occurred, that the time for the first regular car was forty minutes after the hour of the accident, and that before his wagon was struck by the car he did not hear the sound of a gong or any notice or warning from the men in control of the car. *Held*, that the plaintiff could be found to have been in the exercise of due care. *Finnick* v. *Boston & Northern Street Railway*, 382.

22. In actions against a street railway company respectively by the driver and the owner of a team, for personal injuries and injuries to the horses and wagon, it appeared that the wagon was a heavy two horse caravan fifteen or sixteen feet long and about seven feet wide, and was loaded with twelve piles from twenty-five to thirty feet long extending beyond the horses' heads and about twelve feet from the ground at the forward end, that the plaintiff in the first case was driving this team along a level and straight road at about half past seven o'clock in the evening of a day in October, when it was run into from behind by an electric car of the defendant which had not rung a gong for several hundred feet and which struck the left hind wheel of the wagon with such force as to bend the axle and drive the wheel up against the body of the wagon and shove the wagon along about twelve feet, making gouges in the road. *Held*, that there was evidence for the jury of due care on the part of the driver and of negligence on the part of the motorman. *Logan* v. *Old Colony Street Railway*, 115.

Actions for causing death.

23. In an action under R. L. c. 111, § 267, against a street railway company for causing the death of the plaintiff's intestate, while a passenger on a car of the defendant, it appeared that the plaintiff, a man seventy-three years of age, was seated on the last seat of an open car and facing the rear of the car, that his legs were crossed below the knees and his arms folded, that the conductor and the motorman in charge of the car had observed him in that position and had noticed that he seemed somewhat exhausted, that as the car was passing around a curve he was thrown out and received injuries from which he died, and there was evidence that this was due to the rapid swaying of the car. There was evidence warranting a finding that as the car approached the curve it was running to make up time and its velocity was greater than its customary speed of eighteen miles an hour, while a reduction of speed to five or six miles an hour was reasonably proper when entering upon and going around the curve. *Held*, that there was evidence warranting the jury in finding that gross negligence of the servants of the defendant caused the death of the plaintiff's intestate. *Spooner* v. *Old Colony Street Railway*, 182.

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Negligence (*continued*).

24. In an action against a street railway company under R. L. c. 111, § 267, for causing the death of the plaintiff's intestate by the negligence of the defendant or the unfitness or gross negligence of its agents or servants, it is right to refuse to make a ruling that "if the motorman of the defendant was operating its car at the time of the accident at a rate of speed in excess of that allowed by law, then that fact is *prima facie* evidence of gross negligence," although this fact in connection with other facts would be evidence of a failure to exercise ordinary care. *Caswell* v. *Boston Elevated Railway*, 527.

25. In an action against a street railway company under R. L. c. 111, § 267, for causing the death of the plaintiff's intestate by the negligence of the defendant or the unfitness or gross negligence of its agents or servants, it appeared that at an early hour in the morning the intestate was driving a milk wagon from an intersecting street across the tracks of the defendant when his team was struck by a car of the defendant transporting coal to its power house. The evidence warranted findings, that the intestate was in the exercise of due care, that the motorman saw the team shortly before it reached the tracks, and on seeing it tried to stop his car, and that the accident was caused by the failure of the motorman to keep a proper lookout, or to check his car in time, or by both of these things. *Held*, that a trial judge sitting without a jury was right in refusing to find that the negligence of the motorman was gross within the meaning of the statute. *Ibid.*

26. In an action against a street railway company under R. L. c. 111, § 267, for causing the death of the plaintiff's intestate by the negligence of the defendant or the unfitness or gross negligence of its agents or servants, in running a car of the defendant into a team which the plaintiff's intestate was driving from an intersecting street across the defendant's tracks, if it appears that the conductor of the car was negligent in not having obtained a license from the police commissioners of the city of Boston under St. 1897, c. 343, but that the car was so constructed that the conductor from his position at the rear could not see teams coming in front, and the only negligence that caused the accident was that of the motorman, the negligence of the conductor in failing to obtain the license is immaterial and does not affect the liability of the defendant. *Ibid.*

27. The violation by a motorman of an ordinance of a city requiring every person having the control of the speed of a street railway car to keep a vigilant watch for all teams, carriages and persons, under R. L. c. 112, § 40, which imposes a penalty on a street railway company whose servants and agents wilfully or negligently violate regulations of the board of aldermen of a city as to the rate of speed allowed in its streets, does not constitute negligence on the part of a street railway corporation as distinguished from negligence of its agents and servants within the meaning of R. L. c. 111, § 267. *Ibid.*

Cross references.

Whether a street railway can be said to be negligent in transporting over its tracks in a public street cars decorated in a manner to frighten horses, see *post*, 35.

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Whether a street railway can be said to be negligent in transporting over its tracks in a public street excursionists who are so noisy as to frighten horses, see *post*, 36, 37.

As to conclusiveness of judgment for defendant in action against street railway company for negligence as bar to subsequent action by same plaintiff for same injuries but based on a different theory of law, see JUDGMENT, 2.

Railroad.

28. In an action by a woman against a railroad company for personal injuries incurred while a passenger on a train of the defendant, it appeared that, as the train was approaching a station at which the plaintiff was to alight to take a connecting train and before the brakeman had called the name of the station, the plaintiff started for the platform to be ready to alight, that the door of the car had been left open by a conductor or a brakeman, apparently for purposes of ventilation, that as the plaintiff stepped upon the threshold there was an unusual jolt of the car and to protect herself from falling she took hold of the jamb of the door, and as she stepped upon the platform the door swung to and caught her fingers, causing the injuries. *Held*, that, even if there was evidence that the plaintiff was in the exercise of due care, which was doubted, there was no evidence of negligence of the defendant. *Weinschenk* v. *New York, New Haven, & Hartford Railroad*, 250.

29. In an action against a railroad company under R. L. c. 111, § 267, for causing the death of the plaintiff's intestate, not a passenger or in the employ of the defendant, by reason of its negligence or the gross negligence of its servants, it appeared that the plaintiff's intestate while engaged with others in loading a heavy block of granite upon a freight car standing on a steep grade in a quarry was fatally injured by the starting of the car down the grade which caused the block to fall upon and crush him, that the starting of the car was due to a defective brake, that the grade on which the car stood was not so steep but that a brake in proper condition could have controlled the car, and that the ordinary course of business between the defendant and the quarry company was for the defendant to furnish cars at or near the place of loading on the quarry company's tracks and take them away when loaded. *Held*, that there was evidence for the jury that the defendant was negligent in providing an unsafe car for the use of the plaintiff and his fellow workmen, and evidence that the accident was caused by the gross negligence of the defendant's servants or agents in permitting the defective car to be used; *also*, that if there was negligence on the part of the workmen of the quarry company in failing to block the wheels of the defective car with pieces of wood, as an additional precaution, this did not relieve the defendant from liability. *Hale* v. *New York, New Haven, & Hartford Railroad*, 84.

Messenger Company.

30. If in response to a signal from a call box a corporation supplying messenger boys to carry messages and do errands furnishes a boy, who is sent

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by the person calling for him with a receipted bill to collect rent and collects the rent and disappears with it, and no special arrangement has been made with the company in regard to the performance of this service, the employer of the boy cannot recover the amount of his loss from the corporation supplying him, without showing negligence on the part of the corporation in selecting the boy as a messenger. *Haskell* v. *Boston District Messenger Co.* 189.

31. In an action against a corporation supplying messenger boys to carry messages and do errands, for the loss of a sum of money stolen by a messenger supplied by the defendant when sent by the plaintiff to collect rent, it is proper to exclude evidence, offered by the plaintiff to show knowledge on the part of the defendant that the employers of its messengers sometimes entrusted them with money. *Ibid.*

When messenger company not common carrier, see CARRIER.

Owner of Animal.

32. In an action by a teamster against a contractor employing him, for injuries from the kick of a horse, which the plaintiff drove, harnessed, groomed and sometimes fed during the two months that he had been in the defendant's possession, there was evidence that, a short time before the accident, a veterinary surgeon was asked by the defendant "if he knew any reason why the horse should be poor, and not take fat and look a little better," and that, after looking him over, he inquired whether he was a nervous horse and was answered in the negative, after which he said, "I should call him a nervous, vicious horse." He further gave his opinion that the horse had no special ailment. *Held*, that there was nothing in this testimony having any tendency to show that the horse was likely to kick, or that it was the duty of the defendant to tell the plaintiff that the horse was dangerous. *Cooper* v. *Cashman*, 75.

33. In an action by a teamster against a contractor employing him, for injuries from the kick of a horse alleged to be vicious, it appeared that the plaintiff was fifty-one years of age and had worked in stables from the age of eighteen or twenty years, that the horse which kicked him was one of a large number which the defendant brought at one time to his stable from Canada or the West, that the plaintiff was the only person who drove this horse from the time he arrived until the time of the accident, about two months later, and that during that time the plaintiff groomed, harnessed and unharnessed the horse, taking up his hind feet and cleaning them, and sometimes fed him, that he never saw the horse do anything that he would call vicious, and that he liked him and had told the defendant that he was a good, clever horse, that the only previous misbehavior on the part of the horse while in the possession of the defendant was that on the day of his arrival, when there was a crowd of spectators about him, he kicked a man, not a horseman, who went into his stall carrying a pail, that this incident was a matter of common knowledge about the stable, and that thereafter the horse never was known to kick anybody until the time of the accident. The plaintiff testified that he did not know of the previous kicking, but there was no evidence that the defendant believed or had reason to believe

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that the plaintiff was ignorant of what had happened. *Held*, that the failure of the defendant to tell the plaintiff of the previous kicking was not evidence of negligence on the part of the defendant. *Cooper* v. *Cashman*, 75.

In Use of Highway.

34. A woman who on her way home from church on a Sunday morning attempts to cross a street which she knows has been closed and undergoing repairs, but before doing so looks to see whether the repairs are completed at that place and thinks that they are, can be found to be in the exercise of reasonable care in attempting to cross without ascertaining that the crossing is safe. *McMahon* v. *Boston*, 388.

35. A street railway company may be found to have been negligent in operating cars decorated in such a manner as to frighten horses, and to be liable for injuries thus caused. *Joyce* v. *Exeter, Hampton and Amesbury Street Railway*, 304.

36. Whether a street railway company could be found to be liable for injuries to a horse who ran away when frightened by the noisy singing, shouting and horn blowing of a party of excursionists in one of its cars, whose disorderly conduct it made no effort to suppress, *quære*. *Ibid.*

37. In an action against a street railway company for injuries to the plaintiff's horse who ran away when frightened by electric cars of the defendant decorated with strips of white cotton cloth and bunting while carrying an excursion party, there was evidence, that the plaintiff's horse was gentle and not afraid of electric cars, that he was harnessed to a delivery wagon and was standing in front of the plaintiff's store secured by a rope to an ordinary twenty-eight pound weight, that the excursion cars followed a regular car at distances of from six hundred to a thousand feet apart, that the bunting with which the cars were decorated was flapping with the motion of the cars and was bulging in and out, that on the second excursion car one end of the bunting was loose and in motion, that the cars were running "pretty fast," that there was a great amount of noise made by the passengers on one of the excursion cars in singing, shouting and blowing horns, that on the approach of the second excursion car the horse turned, ran down the street and was injured, that before and when the horse ran away the plaintiff and his clerk were engaged in putting up orders, that their attention was attracted to the noise upon the excursion car, but that neither of them left his place in the store to do anything with reference to the horse before he started to run. *Held*, that there was evidence for the jury of due care on the part of the plaintiff and of negligence on the part of the defendant. *Whether* the defendant would have been liable if it had been found that the injuries were caused by disorderly conduct of its passengers which it made no effort to suppress was not considered. *Ibid.*

38. If one in control of an automobile on a public street comes up behind a market wagon, drawn at the rate of four miles an hour by a horse, not given to shying, kicking or running and not afraid of automobiles, and without sounding his horn comes within ten feet of the nearer hind wheel

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of the wagon and tries to pass where there is not room, he may be found to be negligent in not sounding his horn in conformity with the obligations imposed by St. 1903, c. 473, §§ 7, 10, and if the horse kicks and breaks his driver's leg, it may be found that this negligence was the cause of the injury. *Gifford* v. *Jennings*, 54.

39. A girl six years and eight months of age engaged in play upon a highway, although not a traveller entitled to recover under the highway act for an injury from a defect in the street, can maintain an action against a person by whose negligence she is injured while in the exercise of the degree of care reasonably to be expected from her. *Slattery* v. *Lawrence Ice Co.* 79.

40. A girl six years and eight months of age sitting on the curbstone of a sidewalk, who, when told by an ice man carrying a piece of ice on his shoulder to get out of the way, gets up, moves out of the way, and sits down again farther along on the curbstone, if injured by the ice falling and striking her leg when the ice man stumbles, can be found to be in the exercise of the degree of care reasonably to be expected from her, and even in the exercise of the degree of care to be expected from a reasonably careful adult. *Ibid.*

41. If the employee of an ice company carries a one hundred pound piece of ice on his shoulder without tongs in a street where many children are near, and, slipping as he approaches the curbstone of a sidewalk, gives the cake of ice a twitch or jerk so that it falls and strikes the sidewalk bounding up and breaking the leg of a child who in the exercise of due care has moved to make room for the ice man to pass, there is evidence of the employee's negligence, and the ice company may be found to be liable for the injury to the child, as the resulting accident although unusual and peculiar is not so extraordinary that it might not reasonably have been foreseen and guarded against by those in charge of the ice company's business. *Ibid.*

Facts warranting finding that milkman driving on highway and crossing street railway track was not negligent, see *ante*, 21.

Facts warranting finding that one driving heavy two horse caravan on highway upon street railway tracks was not negligent, see *ante*, 22.

In Manufacturer's Freight Yard.

42. In an action by a freight brakeman against a manufacturer of articles made from rattan for injuries from being crushed between a pile of rattan near a branch track in the defendant's yard and a moving car on the side of which was the plaintiff, it appeared that the yard continuously was in a much crowded condition and that it was a custom to pile rattan in the spaces between the buildings wherever a vacant space could be found, that the pile of rattan with which the plaintiff came in collision was beside a brick building which was just beyond it and nearer the track, that the plaintiff had been a freight brakeman for a year and a half and had switched cars in this yard almost daily for about six months before he was injured, that the car upon which he was injured was of unusual width, that it frequently came in contact with buildings beside the track in the yard and when it tipped sometimes had touched the brick building mentioned

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above, that he knew all of these facts, as well as the fact that rattan sometimes was piled where he was injured, that when he was injured the car was moving at the rate of about four miles an hour, that he either was ascending the ladder at the side of the car or had his foot in the stirrup, and was not facing or looking in the direction in which the car was going. *Held*, that there was no evidence that the plaintiff was in the exercise of due care. *Flansberg* v. *Heywood Brothers and Wakefield Co.* 125.

Gross Negligence.

43. Gross negligence of the servants of a corporation operating a railroad or a street railway, which under R. L. c. 111, § 267, makes the corporation liable for the death of a passenger caused by such negligence, is shown by proof of a reckless and wilful disregard of consequences in the conduct of such servants. *Spooner* v. *Old Colony Street Railway*, 132.

For gross negligence and negligence of corporation in actions under R. L. c. 111, § 267, see *ante*, 23–27, 29.

City operating Ferry.

City of Boston liable for negligence as common carrier in operating East Boston ferry, see MUNICIPAL CORPORATIONS, 3.

Elevator.

R. L. c. 104, § 27, requiring certain safety devices for elevators does not apply to a temporary elevator erected and maintained for transporting materials in the construction of a building, see ELEVATOR.

Where plaster wall of well of freight elevator running from sub-basement to street sidewalk is scratched and banged by operation of elevator, proprietor not liable to employee using elevator for injury caused by catching toe in small hole in wall, see *ante*, 8.

Storing Products of Crude Petroleum.

Liability of one storing products of crude petroleum improperly and contrary to statute, see NUISANCE, 2.

Allowing Fictitious Negotiable Note to pass from Possession.

44. If the possessor of an instrument falsely purporting to be a negotiable promissory note, which he has signed in the names of other persons with the intention of deceiving any one to whom it may come, negligently permits the instrument to pass from his custody and control, this, without more, does not make him liable to one who in the exercise of reasonable diligence takes the instrument before maturity for value and thereby suffers loss. *Costelo* v. *Barnard*, 260.

NEGOTIABLE INSTRUMENTS ACT.

R. L. c. 73, § 138, does not affect extinguishment of promissory note through payment by one who indorsed it in blank before delivery, see BILLS AND NOTES, 6.

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NEW TRIAL.

See PRACTICE, CIVIL, 18.

NUISANCE.

1. One maintaining a nuisance by carrying on a business contrary to the provisions of a statute is liable to a person injured by the nuisance. *Moeckel* v. *Cross & Co.* 280.
2. In an action for injuries to greenhouses occupied by the plaintiff and to plants and flowers therein from an explosion on premises of the defendant, it appeared that the defendant maintained a building upon its land for the storage or keeping of gasoline and kerosene, two of the products of crude petroleum, in violation of the provisions of R. L. c. 102, §§ 113, 114, that in the rear of the building were three large iron tanks used for keeping kerosene and gasoline, which were fitted with pipes running to the large filling room of the defendant's building through which oil was drawn from the tanks, that a small room was partitioned off which was used for gluing barrels, that there was a boiler in the small room in which a fire was built when gluing was done, and that the two rooms were connected by a door which closed automatically, that this door was hung on trucks at the top, was not stable at the bottom and would swing out from the bottom, that the barrels were filled with gasoline through an automatic faucet which shut off with a spring, that it did not always close properly and then the gasoline would run over, that a lamp was used for heating glue and generally was kept lighted, that there was always a strong smell of gasoline and kerosene about the room and a good many feet from it, that on the morning of the explosion in which the plaintiff's property was injured, a servant of the defendant was engaged in gluing barrels, that in the explosion the defendant's servant was killed and near his body was found the body of a man not in the employ of the defendant. *Held*, that the jury were warranted in finding both that the defendant was maintaining a nuisance, and that it was conducting its business in a negligent manner. *Ibid.*

Old boat house of private person on public landing place is nuisance and it may be removed by proper authorities unless maintained for forty years adversely under claim of right, see LANDING PLACE.

Attempt of board of health of municipality to prohibit manufacture of brick except subject to its control and permission, see BOARD OF HEALTH, 1–3.

Proper procedure on part of board of health of municipality in abating nuisance, see BOARD OF HEALTH, 1, 2.

ORDER.

For effect on liability of one as drawer of order for payment of future wages of bankruptcy proceedings intervening before wages became due, see BANKRUPTCY, 4.

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PARDON.

Governor not required to submit to Council petition to pardon one convicted of crime before denying petition, see CONSTITUTIONAL LAW, 3.
Commutation of sentence is conditional pardon, see CONSTITUTIONAL LAW, 4.

PARKS AND PARK COMMISSIONERS.

On a petition under St. 1894, c. 288, § 5, for the assessment of damages from the taking by the metropolitan park commissioners of land near that of the petitioner for the construction of a boulevard, it appeared that the only land of the petitioner shown to have suffered special and peculiar damage was land used as a mill pond adjacent to the park. The petitioner asked the presiding judge to make various rulings relating to the right of access from his land to the boulevard under the rules of the park commissioners, which could be material only in reference to the possible future use of the land after a change in its condition by filling. The judge instructed the jury that if the land should be filled and cut into building lots with separate ownership, the owners would have a right of access from their lots to the boulevard, that the rules of the park commissioners were and would be valid only so far as they were reasonable, and that rules that were reasonable under certain conditions might not be reasonable under different conditions. *Held*, that the petitioner was not aggrieved by the failure of the judge to instruct the jury more fully as to the rules of the park commissioners in their application to the petitioner's land either in its present condition or in its conjectural future condition. *Whitney* v. *Commonwealth*, 531.

Law limiting height of buildings bordering on a park where the park commissioners have established a building line does not apply where a building line has not yet been established, see BUILDING LINE.

PARTNERSHIP.

In an action against the members of an alleged partnership of three persons for the price of lumber used in building an open air theatre, where the first defendant was defaulted and the case was defended by the second and third defendants on the ground that they were not partners of the first defendant, it appeared that the first defendant in the presence of the second defendant had ordered from the plaintiff lumber which had been paid for, that later the first and second defendants ordered more lumber which the plaintiff refused to sell on credit, a balance being due him on a previous order, that the first defendant then said that the next day he would have some one down to pay for the lumber and the balance of the old account, that the next day the second and third defendants came to the plaintiff's office and the second defendant introduced the third defendant "as the moneyed man of the concern," that the second defendant at the request of the third defendant then stepped out, and thereupon the third defendant asked the plaintiff how much the bill was and paid it, and on

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the plaintiff saying that he did not feel like sending any more lumber "down there" the third defendant told him that he was a man of means and that "he was in the concern," and "as to sending goods down there everything would be all right and the bills would be paid," and that he wanted the bills made out to the first defendant. The action was for the price of lumber supplied on the faith of this statement, the bill having been made out to the first defendant. No objection was made at the trial in behalf of the second defendant to the evidence of what was said after he stepped out of the office. The judge refused to rule that there was no evidence of partnership. He instructed the jury that the second defendant was not bound by the conversation unless they should find that he went there and introduced the third defendant as the financial man of the concern, and that this was done for the purpose of getting credit, and if the jury so should find, they then might take into consideration the other evidence with that of the introduction in determining whether the second defendant was a partner to the scheme, and, if he was, might find against him and all the defendants. *Held*, that the rulings were correct. *Held, also*, that the fact that the bill was made out to the first defendant did not prevent recovery against the other defendants, if the bill was made out in this way at the request of the third defendant and he was acting for the second defendant as well as for himself in making the request. *Fay* v. *Walsh*, 374.

PAYMENT.

One who under a mistake of fact thinks that he owes money to a certain person and at his request pays the money to a creditor of that person cannot recover the money from the recipient, the payment in legal effect being made not to the recipient but to his debtor. *Moors* v. *Bird*, 400.

See Bills and Notes, 6; Mechanic's Lien, 1.

PENSION.

Quære, whether statute granting pensions to citizens of Commonwealth for services in national army would be constitutional, see Constitutional Law, 8.

PERPETUITIES.

Construction of provision of will with regard to rule against perpetuities, see Devise and Legacy, 1.

PETROLEUM.

Liability of one keeping products of crude petroleum in violation of statute to person injured by explosion thereof, see Nuisance, 2.

Judicial knowledge that kerosene is product of crude petroleum, see Evidence, 1.

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PLEADING, CIVIL.

1. A declaration, in an action of contract against a city, alleging that the plaintiff served as a police officer of the defendant, lawfully appointed and qualified, for a period named and until a certain day, and that from that day until the date of the writ he was at all times ready to discharge the duties of his office at the daily compensation paid by the defendant, but was prevented from doing so by the agents of the defendant, and that upon a proper demand payment for his services had been refused, is good on demurrer as setting forth a cause of action. *French* v. *Lawrence*, 230.
2. In a declaration in an action of contract against a city for services as a police officer, in which it is alleged that the plaintiff, after an appointment and after service of six or seven years, offered to perform his duties but was prevented from so doing by the agents of the defendant, an averment that on a certain day the plaintiff "was illegally and unjustifiably prevented and restrained from performing the duties of his office by the agents of the defendant" cannot be interpreted on demurrer as an averment that the plaintiff had been suspended or removed from his office or that his offer of services was made during such suspension or after such removal. *Ibid.*
3. A declaration, alleging that the defendant, intending to deceive any person to whom it might come, made an instrument in writing purporting to be a negotiable promissory note of a certain town, and unlawfully signed thereto the names of the persons holding the offices of selectmen and treasurer, that the defendant was negligent in the care and custody of this instrument and negligently permitted it to pass from his custody and control, and that the plaintiff in the exercise of reasonable care and diligence took the instrument before maturity for value, thereby suffering loss, sets forth no cause of action, and is bad on demurrer. *Costelo* v. *Barnard*, 260.

Petition under St. 1900, c. 453, for damage to real estate caused by abolition of grade crossing where petitioner was mortgagee and did not comply with requirements of R. L. c. 111, §§ 112, 113, see GRADE CROSSING ACTS, 1.

For declaration for libel held good on demurrer, see LIBEL AND SLANDER, 1, 2.

PLEADING, CRIMINAL.

What constitutes sufficient indictment of officer of corporation for making false entries in book of corporation with intent to defraud, see FALSE ENTRIES, 1.

PLEDGE.

If one indorses a certificate of stock in blank and entrusts it to another permitting him to have the stock transferred to himself and to take out a certificate in his own name for the purpose of pledging the stock for the benefit of the owner, and the person thus entrusted with the stock wrongfully pledges it to secure his own promissory note given in part for advances

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of money and in part for a pre-existing debt, the pledgee, if he takes the stock in the belief that the pledgor is the owner of it, acquires the right to hold it for the full amount of the debt to him, and the owner's only remedy in equity is to redeem the stock from the pledge. *Gurley* v. *Reed*, 509.

POLICE OFFICER.

1. Duty of police officer as to making arrest without a warrant, see *Robinson* v. *Van Auken*, 161.
2. A petition by a police officer for a writ of mandamus to compel the mayor and other officers of the city of Taunton to recognize him as such on the ground that he was removed without cause was denied on the ground that by an ordinance valid under the city's charter the term for which he was appointed had expired. *Lahar* v. *Eldredge*, 504.

Declaration in action of contract by police officer against city alleging due appointment and qualification, willingness to perform duties and refusal of city to pay salary, *held* good on demurrer, see PLEADING, CIVIL, 1, 2.

PRACTICE, CIVIL.

Parties.

1. One who sells goods or materials acting as the agent for another, and sends the bill on paper with a heading giving the name of his principal and his own name as agent, cannot maintain an action for the price of the goods or materials in his own name. The action must be brought in the name of the disclosed principal. *Fay* v. *Walsh*, 374.
2. The holder of a promissory note can maintain an action on it without showing any beneficial interest. *Fay* v. *Hunt*, 378.
3. Where a policy of insurance against fire upon mortgaged real estate provides that it shall be payable in case of loss to the mortgagee, if an action on the policy is brought by the insured without the knowledge of the mortgagee a subsequent assent of the mortgagee is sufficient to enable the plaintiff to maintain his action. The question whether in such a case the plaintiff is entitled to costs was not raised by the record. *Green* v. *Star Fire Ins. Co.* 586.

Proper Remedy.

4. Although R. L. c. 196, § 39, provides that the provisions of that chapter, commonly called the mill act, shall apply, so far as applicable, to a dam erected and maintained across a stream to flow land for the cultivation and growth of the cranberry, this does not make a petition under § 4 of that chapter the sole or proper remedy of one whose cranberry bog adjoining a pond is injured by the owner of another bog, which adjoins the stream feeding the pond, from unlawfully storing water on the lower bog by means of dams. *Nye* v. *Swift*, 143.

Amendment.

5. Where in an action for goods sold and delivered or materials furnished, brought by an agent who acted in the transaction for a disclosed principal,

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the presiding judge in the Superior Court refuses to order a verdict for the defendant, without the defendant calling his attention to the fact that the action ought to have been brought in the name of the principal, and the plaintiff obtains a verdict, on exceptions to this ruling alleged by the defendant this court may order that the exceptions be sustained unless the plaintiff is allowed by the Superior Court, after hearing the defendant, to amend his writ and declaration by substituting the principal as plaintiff and the plaintiff does so amend, and may order that if such an amendment is allowed and made the exceptions shall be overruled. *Fay* v. *Walsh*, 374.

6. Under R. L. c. 173, § 48, the refusal of a presiding judge to allow a defendant to amend his answer is a matter of discretion, and, if the judge thinks that the purpose of an amendment is vexation and delay and not to enable the defendant to make a legal defence, it is proper for him to deny the motion to amend. *Fay* v. *Hunt*, 378.

7. An amendment to a declaration on a memorandum as a contract in writing changing it into a declaration on an oral contract of which the writing is a memorandum does not so change the original cause of action as to discharge the sureties upon the defendant's bond to dissolve an attachment. *Morton* v. *Shaw*, 554.

Waiver of Defects in Pleadings.

8. Where in an action of contract the defendant does not demur to the declaration but proceeds in a hearing before an auditor until all the evidence has been put in before objecting that the declaration sets forth no cause of action, he has waived that objection, and, if facts have been proved sufficient to establish a cause of action, it is too late for him to ask for such a ruling at the trial. *George N. Pierce Co.* v. *Beers*, 199.

Variance.

One alleging himself to be owner of unincumbered fee in certain real estate taken under St. 1900, c. 453, not allowed to recover where evidence shows him to be mortgagee not in possession, see GRADE CROSSING ACTS, 1, 2.

Conduct of Trial.

Proper exercise of discretion by trial judge in direct examination of witness, see WITNESS, 1, 2.

Proper exercise of discretion by trial judge in cross-examination of witnesses, see WITNESS, 3, 4.

Auditor's Report.

9. In a hearing before a master appointed by a single justice of this court in a case coming by appeal from the Probate Court, the report of an auditor appointed by the Probate Court under R. L. c. 165, § 56, which was filed in the case in the Probate Court and relates to the issues on trial is admissible as a part of the case which it is the duty of the master to hear. *Collins* v. *Poole*, 599.

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Agreed Statement of Facts.

10. On an agreed statement of facts without the power to draw inferences the court cannot infer from the stated fact that a letter was written and mailed that it was received by the person to whom it was addressed. *Morse* v. *Fraternal Accident Association*, 417.

Finding of trial judge upon agreed statement of facts with power to draw inferences sustained on appeal because of justifiable inferences, see SALE, 3.

Law and Fact.

11. Whether a rule of park commissioners is reasonable and binding as applied to known facts is a question of law, but where the facts are in dispute or uncertain it is a question to be decided by a jury under proper instructions. *Whitney* v. *Commonwealth*, 531.

Verdict.

12. Where a discharge in bankruptcy is set up as a bar to an execution, and it appears from the record that the judgment on which the execution issued was entered upon a general verdict on a declaration containing several counts, one of which stated a cause of action that would be released by a discharge in bankruptcy while the other counts did not, *whether* evidence might not be received of the proceedings at the trial to determine, if possible, on which count the verdict was rendered, *quære*. *McChristal* v. *Clisbee*, 120.

Where form of verdict is prepared, after conclusions of fact agreed upon by jury, under communication by telephone from judge presiding at trial as to which form to use, verdict will not be set aside if there is no miscarriage of justice, see *post*, 13.

New Trial.

13. On a motion for a new trial, on the ground that before the returning of the verdict the judge communicated with the jury during an adjournment of the court in the absence of counsel, it appeared that the case was a petition for the assessment of damages to the petitioner's land from the construction of a boulevard by the metropolitan park commissioners, and that four issues were submitted in writing to the jury two of which were to be answered by giving nominal damages and the other two by filling in such damages as the jury might find, that, after the adjournment of the court, at about nine o'clock in the evening the judge at his house out of town was notified by telephone by the court officer in charge of the jury, that the jury had agreed on the amount of damages but did not understand which of the forms were to be used for filling in the nominal damages and which for the amount found by them, that the judge by telephone directed the officer to bring the jury to the room in the court house in which the telephone was, that the officer did so, there being no one present in the room except the officer and the members of the jury, and that thereupon the judge by telephone explained to the foreman, who repeated the explanation to the jury, which forms were intended for the nominal damages and which for the amount found by them, that the jury then returned to their room

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and filled out the forms, which were signed by the foreman and sealed in the usual manner and the next morning were returned into court by the jury, when the verdict was affirmed. *Held*, that, although such communications with a jury are open to grave objections on account of the possibility of misunderstanding or mistake, in this case as no miscarriage of justice had resulted the communication did not require the court to set aside the verdict. *Whitney* v. *Commonwealth*, 581.

Appeal from Land Court.

14. A petition to the Land Court, for registration of title, by the owner of a portion of a dwelling house, divided vertically, against the owners of the remaining portion, alleged no boundary on the side next the respondents' lot other than the land of the respondents. The petitioner appealed from the decree of the Land Court to the Superior Court on issues framed by the Land Court under R. L. c. 128, § 13, as amended by St. 1902, c. 458. The issues were framed as follows: "1. Have the respondents any right, title or interest in the real estate claimed by the petitioner? 2. If the respondents have any right, title or interest in the real estate claimed by the petitioner, what is it?" A judge of the Superior Court reported the case for determination by this court on matters of law. It appeared by the record that the parties made conflicting claims in the Land Court in regard to the ownership of a strip of land which depended on the location of the boundary line between their respective properties, and that the judge of the Land Court made findings on this subject. *Held*, that, although the issues might have been framed in better form to present the questions to be answered in the Superior Court, yet, read in connection with the findings of the judge of the Land Court, it appeared that the issues were intended to present to the Superior Court the question of the title to the strip of land in dispute. *Jeffery* v. *Winter*, 90.

15. Where an appeal has been taken from a decree of the Land Court to the Superior Court on issues framed by the Land Court under R. L. c. 128, § 13, as amended by St. 1902, c. 458, and a judge of the Superior Court reports the case for determination by this court on matters of law, the case after decision by this court goes to the Superior Court, which must determine finally the matters involved in the appeal, and remand the case to the Land Court under § 14 of the same chapter. *Ibid.*

Appeal from Probate Court.

Heirs presumptive of one *non compos mentis* are persons aggrieved having right to appeal under R. L. c. 162, § 9, see PROBATE COURT, 4.

Effect of appeal, see PROBATE COURT, 5.

What open on appeal, see PROBATE COURT, 6.

Exceptions.

16. Under Rule 48 of the Superior Court a judge of that court may receive a request for an instruction after the closing arguments and allow an exception to his refusal of the request. *Robertson* v. *Boston & Northern Street Railway Company*, 108.

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17. Under R. L. c. 173, § 106, as under previous statutes, a judge has no power to allow further time for filing exceptions on a motion made after the expiration of the twenty days prescribed for the filing. *Hack* v. *Nason*, 346.

18. Sending by mail to the adverse party a copy of a bill of exceptions without any signature of counsel and with no accompanying letter or memorandum as to the filing thereof is not a notice to the adverse party of the filing of a bill of exceptions within the meaning of R. L. c. 173, § 106, and Rules 47 and 29 of the Superior Court. *Broomfield* v. *Sheehan*, 585.

19. If a party who has taken many exceptions at a trial submits his case to this court on a brief those exceptions not argued in his brief will be treated as waived, although he states in his brief that he relies on all the objections set forth in his exceptions. *Fay* v. *Hunt*, 378.

20. Where a bill of exceptions does not state that it contains all the material evidence and where the charge of the presiding judge is made a part of the bill of exceptions, this court may have recourse to the charge of the judge to obtain material facts not otherwise stated. *Botkin* v. *Miller*, 411.

21. Where a party to an action asked for certain rulings which were refused properly by the judge because too broad, and excepted to the refusal, but did not except to any part of the judge's charge, this court in dealing with the exceptions has no occasion to consider whether the rulings given were correct or not. *Moeckel* v. *Cross & Co.* 280.

22. An exception to a refusal to grant a request for a ruling which assumed conditions in regard to the evidence some of which did not appear in the bill of exceptions was not considered. *Bergfors* v. *Caron*, 168.

23. Upon a bill of exceptions to the findings and rulings of a judge sitting without a jury, which does not contain all the evidence and omits among other things an auditor's report, and where the judge has taken a view the result of which does not appear except as disclosed by his findings, the findings of the judge upon a question of fact will not be disturbed, especially where there is evidence reported in the bill of exceptions which warrants them. *Forbes* v. *Byfield Woolen Co.* 432.

24. In an action on a policy of fire insurance where the defendant's answer contains a general denial and allegations of two specific defences of forfeiture under the terms of the policy, and where neither in its pleadings nor during the trial has the defendant set up the defence that the action cannot be maintained because the plaintiff has not performed the condition precedent of submitting the amount of his loss to arbitration, the defendant at the argument before this court of its exception to a refusal of the judge to rule that upon all the evidence the action cannot be maintained, cannot raise the question of this new defence which if relied upon might have been raised by demurrer or answer and which has not been disclosed during the trial. *Harris* v. *North American Ins. Co.* 361.

Exception to ruling permitting question tending to elicit testimony material and admissible will be overruled although answer to question was not responsive, if no motion was made to strike out answer and no exception was taken to it, see WITNESS, 6.

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For order of court sustaining exceptions unless amendment is allowed in Superior Court and in that case overruling them, see *ante*, 5.

Judgment or Decree.

25. The libellant in a suit for divorce at any time before the case is tried has the right to have his libel dismissed without a decision upon the merits, and if before trial he files a statement that if the case cannot be continued he "consents that his libel be dismissed, without prejudice, for want of prosecution," the judge has no authority to order the libel dismissed without qualification. *Roach* v. *Roach*, 253.

For practice in divorce procedure with regard to decree for alimony, see MARRIAGE AND DIVORCE, 2, 3.

Conclusiveness of judgment for defendant in action of tort for personal injuries suffered by child *non sui juris* as bar to subsequent action by same child against same defendant for same injuries but based on different theory, see JUDGMENT, 1, 2.

Docket Entries.

26. A docket entry of "1896, August 20, judgment for plaintiff for $4,174.66 and costs. Execution forthwith," in accordance with the terms of an agreement of the same date signed by the parties and filed in court on that day, warrants a finding of a trial judge that the judgment was entered under a special order of court. *Washington National Bank* v. *Williams*, 497.

Docket entry of judgment in accordance with agreement of parties filed in court presumed to have been made upon order of court, see EVIDENCE, 2.

Rules of Court.

Rules 47 and 29 of Superior Court requiring notice in writing to adverse party by one filing bill of exceptions, require something more than merely mailing copy of proposed bill, see *ante*, 18.

Under Rule 48 of Superior Court judge may receive request for instruction after closing arguments, see *ante*, 16.

PROBATE COURT.

Jurisdiction.

1. The Probate Court may authorize the guardian of an insane widow to sell for her maintenance and support her dower and homestead rights in real estate to the owner of the fee although such rights have not been set off to her. *Robinson* v. *Dayton*, 459.

2. The Probate Court may authorize the guardian of an insane person who is a widow to sell her dower and homestead rights in real estate for her maintenance and support without first having her interest in her husband's estate ascertained, paid over and used for her maintenance, if her husband's estate is so small that the personal property may not be worth the necessary accounting. *Ibid.*

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3. The Probate Court may authorize the guardian of an insane woman, whose property is not more than enough to secure her a comfortable support during her life, to invest the entire property in a mortgage of real estate given by one of her sons conditioned to secure her comfortable support and maintenance during her life. *Robinson* v. *Dayton*, 459.

Practice.

4. The heirs presumptive of one who is *non compos mentis* have a right to appeal from a decree of the Probate Court affecting the rights of property of the person *non compos*, being persons aggrieved within the meaning of R. L. c. 162, § 9. *Robinson* v. *Dayton*, 459.

5. During the pendency of an appeal from a decree of the Probate Court granting an administrator leave to sell real estate of his intestate the administrator cannot maintain a writ of entry for it. *Tyndale* v. *Stanwood*, 513.

6. On appeals from decrees made by a single justice affirming the action of the Probate Court, granting to the guardian of an insane widow a license to sell her right of dower and homestead at private sale to one who is a part owner of the fee of the land in question and authorizing the guardian to invest the entire property of the insane person in a mortgage given by the purchaser of the right of dower and homestead to secure the comfortable support and maintenance of the insane person during her life, if the appeals come before this court without findings of fact or a report of the evidence, the only questions open are as to the power of the Probate Court to make the decrees upon any evidence that might have been adduced under the petitions. *Robinson* v. *Dayton*, 459.

On bill for instructions by trustee as to distribution under clause of will previous decree of Probate Court on former bill for instructions interpreting same clause conclusive as to distribution made under it but not as to construction of clause for subsequent distributions, see TRUST, 6.

Report of auditor appointed by Probate Court to hear evidence as to accounting admissible before master appointed by single justice of this court to hear case on appeal, see PRACTICE, CIVIL, 9.

PROXIMATE CAUSE.

In action under R. L. c. 111, § 267, by personal representative of one in employ of granite company which was loading car of defendant railroad company for injuries and death due to defective brake, fact that fellow workmen of plaintiff also were negligent in failing to block car does not relieve defendant from liability, see NEGLIGENCE, 29.

Negligence of ice man whereby piece of ice which he is handling slips and falls to pavement, held to be proximate cause of injury to person whom, rebounding, it strikes, see NEGLIGENCE, 41.

Proximate cause as determining assessability of damages, see DAMAGES, 1, 2.

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RAILROAD.

If a railroad company acquires by a warranty deed the fee of land included in its location, begins work on the location and grades a part of the road-bed across the land, and afterwards abandons the location for railroad purposes and establishes another location elsewhere, this does not divest the railroad company of its title to the land. *Enfield Manuf. Co.* v. *Ward*, 314.

Measure of damages for which railroad company is liable for failure to deliver theatrical scenery and other theatrical property, see DAMAGES, 9.

Liability to passenger, see NEGLIGENCE, 28.

Liability for causing death of person not passenger, see NEGLIGENCE, 29.

REAL ACTION.

During the pendency of an appeal from a decree of the Probate Court granting an administrator leave to sell real estate of his intestate the administrator cannot maintain a writ of entry for it. *Tyndale* v. *Stanwood*, 513.

REFERENCE AND REFEREE.

If the respective rights of the parties under a building contract have been referred by an agreement in writing to a referee for decision, and the referee in making his award keeps within the scope of the submission, the award is not open to question on the ground that the referee was mistaken in his interpretation of the contract. *Phaneuf* v. *Corey*, 237.

REPLEVIN.

For action of replevin where plaintiff sought to rescind sale on ground that goods were procured to be sold through false and fraudulent representations to mercantile agency, see SALE, 3.

RES JUDICATA.

The former decision in this case, reported in 186 Mass. 59, that a writ of entry was prematurely brought by the demandant as administrator to recover land fraudulently conveyed by his intestate, because when the action was brought an appeal was pending from the granting by the Probate Court to the demandant of a license to sell the real estate, governs the case since the correction of the record in accordance with the decision reported in 187 Mass. 531, as it did before that correction. *Tyndale* v. *Stanwood*, 513.

On bill for instructions by trustee as to distribution under clause of will previous decree of Probate Court on former bill for instructions interpreting same clause conclusive as to distribution made under it but not as to construction of clause for subsequent distributions, see TRUST 6.

For other cases as to effect and conclusiveness of judgments, see JUDGMENT, 1, 2.

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RULES OF COURT.

Under Rule 48 of Superior Court judge may receive request for instruction after closing arguments, see PRACTICE, CIVIL, 16.

Rules 47 and 29 of the Superior Court, requiring notice in writing to adverse party by one filing bill of exceptions, are not complied with by merely mailing copy of proposed bill, see PRACTICE, CIVIL, 18.

SALE.

Delivery.

1. If the lessor of machinery which is in the possession of the lessee gives a bill of sale of it, absolute on its face, under an oral agreement that it shall be held as security for certain notes, without recording it or giving notice to the lessee who has no knowledge of the transaction, this passes no title good against attaching creditors of the vendor, and if he is adjudicated a bankrupt his trustee in bankruptcy, who has had no previous knowledge of the bill of sale, can maintain a suit in equity to establish his title to the property subject to the lease and his right to the rent accruing after the adjudication in bankruptcy. *Clark* v. *Williams*, 219.

Passing of Title.

2. Where a banker advances to an importer the purchase money for goods on drafts under a commercial letter of credit which requires that the goods shall be shipped to this country with bills of lading to the order of the banker, one copy to be sent to the banker direct by vessel or mail, the banker becomes the owner of the goods. *Moors* v. *Bird*, 400.

Agreement to look to Another for Payment.

One who sells piano agreeing with purchaser to look for payment to expressman who has injured piano which purchaser formerly had cannot recover from purchaser on expressman's repudiating liability, see CONTRACT, 1.

Rescission.

3. In an action of replevin for goods sold by the plaintiff to the defendant on a credit alleged to have been procured by false and fraudulent representations made by the defendant to a mercantile agency, it appeared that the defendant made a false statement of his condition to the agency, stating surplus assets of $4,900, which a year and a half later the agency at the request of the plaintiff sent to him with the following comment: "Figures cannot be fully corroborated and are generally believed liberal. Carries a small bank balance, asks no accommodation and is reported as meeting obligations promptly. An estimate of about $1,000 for net worth is called conservative." It was agreed that "the plaintiff's credit man would, if competent, testify that he relied upon the statements in extending the credit asked for, but whether he did so rely or rely solely thereon is to be determined by the court from all the facts." The judge to whom

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the case was submitted on an agreed statement of facts, with power to draw inferences, found against the plaintiff. *Held*, that this finding could be justified either on the ground that the credit man did not rely on the statement, or that he had no right to rely upon it because made so long before the plaintiff sold the goods; and *semble* that the comment made by the agency was enough to put the plaintiff on his guard. *Beacon Falls Rubber Shoe Co.* v. *Pratte*, 72.

Conditional Sale.

Retaking of chattel delivered under contract of conditional sale, see AGENCY, 1, 6.

SALES OF MERCHANDISE IN BULK.

St. 1903, c. 415, in regard to sales of merchandise in bulk, has no application to a chattel mortgage of a stock in trade given in good faith for a valuable consideration and duly recorded. *Wasserman* v. *McDonnell*, 326.

SAVINGS BANK.

Perfected trust in savings bank deposit created by way of gift even where trustee was donor and retained bank book in her possession, see TRUST, 1.

SEAMAN.

When seaman becomes member of crew of vessel of class described in U. S. Rev. Sts. §§ 4520, 4523, see SHIP.

SENTENCE, COMMUTATION OF.

See COMMUTATION OF SENTENCE.

SHADE TREES.

A town has an interest in shade trees in its public ways. *Hixon* v. *Sharon*, 347.

SHIP.

Under U. S. Rev. Sts. §§ 4520, 4523, a seaman does not become a member of the crew of a vessel exceeding fifty tons burden which is bound from a port in this Commonwealth to a port in any other than an adjoining State until the shipping articles have been signed both by the master and himself, and no complaint under R. L. c. 66, § 2, will lie for enticing him away from the vessel before such signing. *Commonwealth* v. *Bartlett*, 148.

SHOW WINDOW.

For construction of lease held to include use of show window, see LANDLORD AND TENANT, 1.

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STATUTE.

A statute which provides a civil liability for a failure to comply with its requirements partakes of the nature of a penal statute and should be construed strictly. *Allen* v. *Clark*, 556.

Constitutionality of statutes, see CONSTITUTIONAL LAW.

STATUTE OF LIMITATIONS.

See LIMITATIONS, STATUTE OF.

STATUTES CITED AND EXPOUNDED.

See page 715.

STONY BROOK.

Taking by street commissioners of city of Boston under St. 1897, c. 426, by order locating new channel for Neponset Avenue branch of Stony Brook, of "the right to maintain said new channel and other sewerage works" includes right of using channel for house sewer, see MUNICIPAL CORPORATIONS, 8.

STREET RAILWAY.

1. A street railway company, although not authorized to engage in the business of carrying freight for others, lawfully may run cars loaded with coal over its tracks for the purpose of supplying its power house. *Caswell* v. *Boston Elevated Railway*, 527.

2. *Semble*, that an employee of a street railway company, sometimes called the trolley man, whose duty it is to stand at the rear end of a car used for transporting coal to the power house of the company and look out for the trolley strings, also to turn the switches, and to load and unload the coal, may be found not to be a conductor of the car within the meaning of St. 1897, c. 343, providing for the licensing of conductors of street cars by the board of police commissioners of the city of Boston. *Ibid.*

Under provisions of its charter, Union Freight Railroad Company is treated as street railway company in relation to excise tax, see UNION FREIGHT RAILROAD COMPANY.

Who is passenger on street railway, see NEGLIGENCE, 13.

For cases involving negligence on street railway, see NEGLIGENCE, 2, 13–27.

SUNDAY.

See LORD'S DAY.

SUPERIOR COURT.

Rule 48 of the Superior Court relating to presentation of and ruling upon requests for instructions, see PRACTICE, CIVIL, 16.

Rules 47 and 29 of the Superior Court, relating to notice to adverse party of filing of bill of exceptions, see PRACTICE, CIVIL, 18.

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SURETY.

Under R. L. c. 173, §§ 48, 121, a surety on a bond to dissolve an attachment is not discharged from liability by an amendment to the declaration in the action against his principal in which the attachment was made, although the amendment was allowed without notice to him, if its only effect was to put into proper form the statement of the cause of action for which the action was intended to be brought. *Morton* v. *Shaw*, 554.

Right of wife who signed joint note with husband as surety for his debt secured by mortgage on her land to have note satisfied out of his estate, see HUSBAND AND WIFE, 3.

Guarantor of performance of covenants of lease not discharged because possession was delivered to lessor without opposition while action was pending against lessee, see GUARANTY, 2.

Guarantor of performance of covenants of lease not discharged because of agreement between lessor and lessee by which judgment in action on covenants should be entered and execution postponed to date not later than when execution would have issued had there been no agreement, see GUARANTY, 1.

TAUNTON.

Ordinance of city of Taunton that mayor and aldermen shall annually appoint policemen valid, see MUNICIPAL CORPORATIONS, 1, 9.

TAX.

Excise.

Excise tax on business of selling or giving trading stamps held unconstitutional and void, see CONSTITUTIONAL LAW, 5.

Union Freight Railroad Company liable to excise tax on street railway companies, see UNION FREIGHT RAILWAY COMPANY.

Assessments for Benefits.

Betterments assessed under St. 1902, c. 527, for work done by city of Boston in 1895 in extending Columbus Avenue not breach of covenant against incumbrances in deed made in 1897, see DEED, 3.

For Private Purpose.

Law attempting to equalize bounties to soldiers serving in national army or navy from this Commonwealth would be unconstitutional, as imposing tax for private purpose, see CONSTITUTIONAL LAW, 6.

Laws to promote Patriotism.

Constitutionality of laws granting pensions or rewards to persons serving in national army and navy from this Commonwealth, see CONSTITUTIONAL LAW, 7, 8.

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TRADEMARK AND TRADE NAME.

1. For a discussion of the difference between the right to prevent others from using a trade name and the right to prevent them from using a trademark, see opinion of LORING, J., in *Cohen* v. *Nagle*, 4, 14.
2. A cigar manufacturer, who by long continued and exclusive use of the word "Keystone" in his business in New England has caused the public there to understand that cigars thus named are of peculiar value because of his manufacture, has gained a right to the use of the name as a trade name which is a right of property and is infringed by one who by later selling in New England cigars called "Keystone Maid" deceives the public into thinking them to be of the same manufacture as the "Keystone" brand. *Cohen* v. *Nagle*, 4.

TRADING STAMPS.

St. 1904, c. 403, imposing tax on business of selling or giving trading stamps unconstitutional and void, see CONSTITUTIONAL LAW, 5.

TREE WARDEN.

Reimbursement by town of its tree warden for loss through honest mistake in regard to protection of town's trees proper expenditure of town's money, see MUNICIPAL CORPORATIONS, 2.

TRUST.

Express.

1. If a woman who has made deposits in a savings bank in her name as trustee for one of her sisters, the account having been begun by transferring to it the surplus of the depositor's own account in the same bank over $1,000 when that was the largest amount allowed to a depositor, declares a few weeks before her death to the two daughters of the sister named as beneficiary that the money belongs to their mother, then deceased, and will go to them and that others of the next of kin of the declarant cannot touch it, this can be found to be an admission that the deposit belonged to the sister named as beneficiary, a perfected trust having been created in her favor by way of gift. *McMahon* v. *Lawler*, 343.
2. One holding a certificate for $1,000 of life insurance in a fraternal beneficiary corporation, his wife who was named as beneficiary having died, wished to take out a new certificate for the benefit of his grandchildren, and told one F. that he desired him to receive the money and use it for their care and education as he did not wish it to be within the control of his son, their father. He took out such a certificate payable to F., who was not of a class entitled to be a beneficiary, "as guardian of my grandchildren H. and L." On the death of the insured the $1,000 was paid by the company to F. who never had been appointed guardian of the grandchil-

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dren. He announced in a letter to the father of H. and L. that the money was in his possession, but refused to pay it over. *Held*, that the grandchildren, who were minors, could not maintain an action at law against F. for the money, because it was held by him in trust, and *semble* that an amendment into equity would not help them, there being no ground for a present termination of the trust. *Mee* v. *Fay*, 40.

Constructive.

. When a guardian conveys real estate of his ward to himself through a third person, a constructive trust arises for the ward's benefit, and the guardian or purchaser from him either without value or with notice, must reconvey to the ward and account for rents and profits. *Sunter* v. *Sunter*, 449.

4. Where real estate subject to a prior mortgage is conveyed by a deed absolute in form but really as security for a debt so that the effect of the transaction is an equitable mortgage, if the equitable mortgagee causes the prior mortgage to be foreclosed for the sake of clearing the title and purchases the property at the foreclosure sale and adds the amount thus paid by him to the indebtedness secured by the equitable mortgage, he stands no better than if he had paid off the mortgage and had it discharged, and cannot set up his title acquired at the foreclosure sale as a bar to a bill to redeem brought by the equitable mortgagor. *Alexander* v. *Grover*, 462.

One taking absolute title to real estate under oral agreement to reconvey on payment of grantor's debt to him holds land subject to constructive trust for grantor's benefit, see EQUITY JURISDICTION, 5.

Construction.

Where money, left by will in trust for testator's housekeeper with directions to trustee to pay her income and with power to use principal in purchase of house for her, remains during housekeeper's life intact in savings bank, she takes absolute estate, and whole fund becomes assets of her estate on her death, see DEVISE AND LEGACY, 2.

Distribution of Trust Fund.

5. In the distribution of a fund held by a trustee under a will, if it appears that one of the persons whose estate is entitled to share in the distribution, who was the owner of a vested remainder and of a vested interest in contingent remainders, died, at the age of two years, more than forty-seven years before the distribution, leaving his father as his only heir at law and next of kin, and that an administrator of the estate of the infant then was appointed and since has died, it is not necessary that an administrator *de bonis non* of the infant's estate should be appointed, and the payment of his share may be made directly to the administrator *de bonis non* with the will annexed of his father. *Minot* v. *Purrington*, 336.

6. On a bill by a trustee under a will for instructions as to the distribution of a fund in his hands, it appeared that the fund accrued under a provi-

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sion of the will upon the happening of a certain contingent event, and that many years before on the happening of a like contingent event a distribution under the same clause of the will had been made under a decree of the Probate Court, which omitted from the distribution certain persons entitled to share in it, that at the hearing of the former bill for instructions on which the decree was made the persons omitted from the distribution were living in a foreign country and had no knowledge of the proceedings, but that before the decree was made general notice was given by publication in accordance with law and the rules of the court, and also that the executor of the will under which the excluded persons claimed received notice of the petition and joined in a request that the distribution should be made as ordered by the decree. *Held*, that the former decree of the Probate Court was conclusive upon the parties in regard to the fund distributed under it, and that the payments made under it could not be interfered with, but that the decree had no effect upon the rights of the parties to funds accruing after it was made, and that subsequent payments, distributed erroneously through a misunderstanding by the parties of their rights, should be adjusted in making the present distribution, (all parties interested being before the court, there being no laches, and all claims for income being waived,) by deducting the overpayments and giving the amount of them to the persons wrongly omitted. *Minot* v. *Purrington*, 336.

Administration of charitable trust, see CHARITY; MUNICIPAL CORPORATIONS, 4.

TRUSTEE PROCESS.

As to duty of trustee in writ of trustee process who holds personal property of principal defendant at time of service of writ upon him, some of which is and some of which is not exempt from attachment, see CONVERSION.

UNION FREIGHT RAILROAD COMPANY.

The provision in the charter of the Union Freight Railroad Company, St. 1872, c. 342, § 1, that that corporation, which since 1874 has used nothing but steam as its motive power, "shall have all the powers and privileges and be subject to all the duties, restrictions and liabilities set forth in all general laws which now are or hereafter may be in force relating to street railway corporations, and to other railroad corporations, so far as the same may be applicable," makes that corporation subject to the excise tax imposed on street railway companies by R. L. c. 14, §§ 44–46. *McDonald* v. *Union Freight Railroad*, 123.

VOLUNTARY ASSOCIATION.

Member of voluntary association may compel reinstatement by bill in equity. See EQUITY JURISDICTION, 11.

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VOTING BOOTH.

Voting booth placed in travelled part of highway may be found to be defect therein. See WAY, 5.

WAIVER.

There can be no waiver without knowledge of the thing waived. *George N. Pierce Co.* v. *Beers*, 199.

As to waiver of defects in pleading, see PRACTICE, CIVIL, 8.

Agent's oral waiver of provisions in policy of insurance, which by terms of policy cannot be waived except in writing by company, ineffectual, see INSURANCE, 6.

Subordinate lodge of fraternal beneficiary corporation cannot waive provisions requiring certain formalities in changing beneficiary unless such power is given by constitution of corporation, see INSURANCE, 4.

WARRANTY.

Whether owner of note and mortgage securing it impliedly warrants their validity to broker whom he employs to sell them, see CONTRACT, 3.

WATERCOURSE.

Construction of agreement between manufacturing corporations who are adjoining mill-owners on natural watercourse as to use of waters, see CONTRACT, 6.

WATER RIGHTS.

A complaint under the mill act, Pub. Sts. c. 190, for damages from the alleged wrongful flowing of the complainant's land by a dam maintained by the respondent, was heard, except as to damages, by a judge, sitting without a jury, who found that the respondent within the three years next preceding the complaint had maintained its dam at a greater height than it had a right to do without making compensation. On exceptions by the respondent to the refusal of the judge to make certain findings and rulings and to the findings and rulings made by him, all the evidence was not reported and an auditor's report considered by the judge was not before this court. It appeared that the judge took a view of the dam and that the apron was removed from it and some excavations made in order that he might see whether the capsill put in at a certain time rested upon the original stone work or otherwise. What was disclosed by the view did not appear except as it might be inferred from the findings. There was nothing in the deeds put in evidence or in any writing between the parties and their privies fixing the heignt at which the respondent and its predecessors had the right to maintain the dam, and the right of the respondent depended upon a question of fact to be determined upon the evidence relating to the height at which the respondent had maintained its dam and

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exercised the privilege of flowing. *Held*, that the findings of the judge were warranted by the evidence reported in the bill of exceptions which the court did not find it necessary to review in the opinion. *Forbes* v. *Byfield Woolen Co.* 432.

For construction of grant in deed of easement to use of water to flow cranberry bog and consequently to flow grantor's land, see EASEMENT, 1.

WAY.

Private.

1. The reservation in a deed of a right of way in the grantor over the land conveyed without the use of the word "heirs" reserves only a right during the life of the grantor. *Bailey* v. *Agawam National Bank*, 20.
2. In this Commonwealth a right of way cannot be excepted from the operation of a deed unless either the right of way or the way itself is in existence when the deed is made. *Ibid.*
3. A deed by the owner of two adjoining lots of land conveying one of them contained this provision: "A passageway is to be kept open and for use in common between the two houses ten feet in width, five feet of said passageway to be furnished by said H. [the grantee] and five feet by me from land lying east of the land here conveyed." There was no passageway there before the deed was made. *Held*, that this provision was not a reservation nor an exception, but was a contract imposing a right in perpetuity for the benefit of adjoining lands which could be enforced in equity against any one taking with notice of it, and so created an incumbrance on the granted land. *Held*, *also*, that the clause should not be construed to limit the use of the way to the existence of the two dwelling houses then on the two lots, or for use in connection with a dwelling house, but that the way provided for was intended to be for the benefit of the two lots of land, and would not be abandoned or lost, if the dwelling house on the lot retained by the grantor was removed and that lot was cut up into back yards for houses fronting on a parallel street, although those houses were on land to which the right to use the passageway did not attach because not owned by the grantor when he made the deed. *Ibid.*
4. A right of way acquired by an agreement in a deed from the owner of an entire parcel with two houses upon it conveying a part of the parcel and one house, and intended to exist in perpetuity, is not abandoned by nonuser alone. *Ibid.*

Public.

5. A voting booth illegally in the travelled part of a public street may be found to constitute a defect in the highway. *Haberlil* v. *Boston*, 358.
6. In an action for injuries from an alleged defect in a highway, if it appears that the plaintiff was injured in crossing a portion of a street undergoing repairs, and there is evidence on which it could be found that there were no barriers at the place where the plaintiff was injured, the defendant has no right to have an instruction given that the defendant is not liable to a person crossing at a place without a barrier if the jury find that

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the street was properly protected by barriers at the two ends of the part under repair and at the cross streets, as the question whether such barriers if they existed were sufficient is one of fact for the jury. *McMahon* v. *Boston*, 388.

Negligence in use of highway, see NEGLIGENCE, 34–41.

WESTMINSTER CHAMBERS.

Damages to Westminster Chambers by restriction in height of buildings on and near Copley Square in Boston, imposed by statute during construction of that building, see DAMAGES, 5–7.

WILL.

For construction of wills, see DEVISE AND LEGACY.

WITNESS.

Direct Examination.

1. A presiding judge may in his discretion allow leading questions to be put to a witness on his direct examination. *Gray* v. *Kelley*, 184.

2. It is a proper exercise of the discretion of a presiding judge to allow leading questions to be put on direct examination to a very aged witness whose recollection appears to have been exhausted by the general questions previously put to him. *Ibid.*

Cross-examination.

3. A presiding judge is free to exercise his discretion in refusing, on objection made, to allow cross-examination upon a collateral matter, although testimony similar in character to that excluded has been admitted without objection on the other side. *American Woolen Company* v. *Boston & Maine Railroad*, 152.

4. In an action by a manufacturer against a railroad company for an alleged failure to deliver three car loads of coal entrusted to the defendant as a common carrier for delivery to the plaintiff as part of sixty-one car loads, where the plaintiff and the defendant rely respectively on records of the receipt and of the shipment and delivery of car loads of coal, the plaintiff's records not including the car loads in question and the defendant's records including them, it is within the discretion of the trial judge, sitting without a jury, to refuse to allow the plaintiff, for the purpose of showing inaccuracy in the defendant's records, to cross-examine a witness for the defendant to prove that a certain car, not shown to have contained any part of the shipment of coal, was entered as having been sent between the point of shipment and the point of destination as a part of the train on which the shipment was made, when in fact it never had been sent, the judge having permitted the plaintiff to show that any car which was received at the point of destination as a part of this train either was not recorded or was recorded erroneously. *Ibid.*

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Witness (*continued*).

Refreshing Recollection.

5. A plaintiff, testifying as to the amount of an order for materials furnished by him to the defendant, may be allowed to refresh his recollection from entries made in an account book by his bookkeeper. *Fay* v. *Walsh*, 374.

Impeachment.

6. In an action against a street railway company for personal injuries, the defendant contended that the plaintiff was injured while attempting to get on a moving car when he was intoxicated. The plaintiff's wife, when cross-examined as to what she had said in reference to the accident to a woman who kept a grocery, denied telling the woman that her husband had gone down the harbor with two fellows from Everett or telling her that he had been drinking. The woman who kept the grocery was called by the defendant as a witness and was asked in regard to the plaintiff's wife "Did she tell you where her husband had been?" This was objected to by the plaintiff and admitted by the judge as competent to affect the credibility of the plaintiff's wife, if she said anything inconsistent with her statements on the stand, and ruled that the statement was "material if she testified as to her husband's condition." The plaintiff excepted to the ruling. The witness answered: "She came in again, and said I should trust her again, without her old bill being paid, because he went away yesterday without leaving any money, and he was drinking, and he was hurt, and she couldn't find any money in his pocket." *Held*, that, even treating the question as not a merely preliminary one, it was competent to ask the witness where the plaintiff's wife said that her husband had been, for the purpose of impeaching the wife's credibility as a witness, and that the answer, which was not responsive, was not in question, no objection having been made to it and no motion having been made to strike it out. *McInnis* v. *Boston Elevated Railway*, 386.

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"Person aggrieved." See *Robinson* v. *Dayton*, 459, 460.
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